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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF INDIANA,

WITH TABLES OF CASES REPORTED AND CITED, AND STATUTES CITED AND CONSTRUED, AND AN INDEX.

CHARLES F. REMY,
OFFICIAL REPORTER.

JOHN W. DONAKER, Assistant Reporter.

VOL. 155,

CONTAINING CASES DECIDED AT THE MAY TERM, 1900, AND NOT REPORTED IN VOLUME 154, AND CASES DECIDED AT THE NOVEMBER TERM, 1900.

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Rec. May 29, 1901.

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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. FRANCIS E. BAKER. * ‡
HON. ALEXANDER DOWLING. || ‡
HON. LEANDER J. MONKS. †
HON. JAMES H. JORDAN. †
HON. JOHN V. HADLEY. ‡

*** Chief Justice at May Term, 1900.**

| Chief Justice at November Term, 1900.

† Term of office commenced January 1, 1895.

‡ Term of office commenced January 1, 1899

OFFICERS
OF THE
SUPREME COURT.

ATTORNEY-GENERAL,
WILLIAM L. TAYLOR.

REPORTER,
CHARLES F. REMY.

CLERK,
ROBERT A. BROWN.

SHERIFF,
GEORGE W. WEIR.

LIBRARIAN,
HOYT N. McCLAIN.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY AND NOVEMBER TERMS, 1900, IN THE
EIGHTY-FOURTH AND EIGHTY-FIFTH YEARS
OF THE STATE.

**WOOD, TREASURER, v. THE STATE, EX REL. SEILER,
TREASURER.**

[No. 19,076. Filed May 11, 1900. Rehearing denied June 5, 1900.]

MANDAMUS.—Alternative Writ.—Joinder of Issues.—The right to an alternative writ of mandate may exist independently of the ability to prove it, and the fact that a county order was indorsed as paid will not defeat an action for an alternative writ of mandate to require the county treasurer to pay the order, since under the provision of §1185 Burns 1894 issues of law and fact may be joined as in civil cases. *pp. 4, 5.*

SAME.—Laches.—The mere delay of sixteen months after the action accrued in applying for a writ of mandate to compel a county treasurer to pay an order on a particular fund cannot be considered unreasonable, or laches of such a character as will alone defeat the action. *pp. 5, 6.*

COUNTIES.—Treasurer.—State School Fund.—In the receipt and disbursement of the State school funds a county treasurer exercises a State function, and an action cannot be maintained against the county for the recovery of such funds. *pp. 6, 7.*

MANDAMUS.—County Treasurer.—Demand.—Where in an action against a county treasurer for an alternative writ of mandate to require the payment of an order the term of the treasurer against

155	1
157	28
155	1
165	690
155	1
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155	1
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whom the action was brought expired and his successor was substituted as the party defendant, the petition need not allege a prior demand upon the substituted defendant. *pp. 7, 8.*

MANDAMUS.—Alternative Writ.—Joinder of Issues.—In an action for an alternative writ of mandate to require a county treasurer to pay a balance alleged to be due on an order on the State school fund, an answer by defendant that the order was marked paid by his successor and deposited with the county auditor as a canceled order, that payment was asserted on one side, and denied on the other, as to such alleged balance, and that defendant could not safely pay same until the amount unpaid, if any, was first determined, in an action for that purpose, constitutes a complete defense to such proceeding. *pp. 9-13.*

SAME.—Evidence.—County Treasurer.—County Order.—In the trial of an action for a writ of mandate requiring a county treasurer to pay a balance alleged to be due upon an order on a particular fund, the court erred in excluding the testimony of a witness tending to prove that there was no money in the treasury at the time demand for payment was made that could be used in payment thereof. *pp. 13, 14.*

SAME.—Evidence.—Presumption.—County Treasurer.—In an action for a writ of mandate to require a county treasurer to pay a balance alleged to be due upon a county order on a particular fund, it cannot be conclusively presumed against a successor in office that the money remained in the treasury until paid out according to law. *p. 14.*

SAME.—Pleading.—Argumentative Denial.—An answer in a mandamus proceeding to require a county treasurer to pay a balance alleged to be due upon an order on a particular fund, traversing the averment of the complaint that such sum, or any sum, was unpaid upon the order, and also that the money liable for the payment was in the treasury at the time the demand was made, was good as an argumentative denial, and, in the absence of a general denial, a demurrer thereto was properly overruled. *pp. 14, 15.*

From the St. Joseph Circuit Court. *Reversed.*

C. W. Miller, J. S. Drake, L. W. Vail and E. A. Dausman, for appellant.

J. M. Van Fleet and V. W. Van Fleet, for appellee.

HADLEY, C. J.—Cyrus Seiler, as treasurer of the school city of Elkhart, on the 4th day of October, 1898, filed in the Elkhart Circuit Court his verified petition and motion for an alternative writ of mandate directed against Delos N.

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Weaver as treasurer of Elkhart county to compel the latter to pay to the former the sum of \$5,900 alleged to be the unpaid balance of three certain orders drawn by the auditor of Elkhart county on the 2nd day of June, 1897, in favor of a former treasurer of said school city, for money due said school city. The case was sent on change of venue to the St. Joseph Circuit Court. The official term of Weaver, as treasurer of Elkhart county, expired December 31, 1898, and appellant, Wood, succeeded to the office January 1, 1899. Wood was thereupon substituted, in his official capacity, as the sole defendant. Wood's demurrer to the complaint and alternative writ was overruled. He then, for return to the alternative writ, answered in two paragraphs. To the first paragraph of answer appellee's demurrer was overruled, and to the second paragraph sustained. Reply to first paragraph of answer, trial by jury, verdict for appellee for \$6,133, and judgment for the issuance of a peremptory writ of mandate.

Error is assigned upon the action of the court in overruling appellant's demurrer to the complaint and alternative writ, and in sustaining appellee's demurrer to the second paragraph of answer, and in overruling appellant's motion for a new trial. Appellee assigns as cross-error the overruling of the demurrer to the first paragraph of answer.

The complaint and alternative writ in substance allege that, in May, 1897, the auditor of Elkhart county made and entered of record in his office a distribution of money then in the county treasury due to the school city of Elkhart; that the distribution as made was correct, and distributed to said school city the sum of \$15,194.67; that, on the 2nd day of June, 1897, said auditor issued his certain three orders upon the treasurer of Elkhart county for the said sum of \$15,194.67, payable to Finn, then the treasurer of the school city of Elkhart, copies of which orders are set forth; that Finn at once delivered the orders to Holderman, the then treasurer of the county; that Holderman paid Finn

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on the orders \$9,294.67, and no more, leaving the sum of \$5,900 unpaid, and which is still unpaid; that Holderman, at the time, stamped on the face of each order: "Paid June 3, 1897. William H. Holderman, Treasurer of Elkhart county"; that the relator, having been previously elected and qualified as treasurer of the school city of Elkhart, on the 4th day of October, 1898, and before the commencement of this suit, presented to the defendant, Weaver, as the then treasurer of the county, the said three orders so issued to Finn, and demanded thereon the payment of \$5,900, which the defendant, Weaver, refused to pay; that, at the time said orders were issued, there was, and still is, in the treasury of said county money liable for the payment of said claim sufficient to satisfy the same in full. Prayer for an alternative writ commanding the defendant to pay the \$5,900, or show cause, and, upon failure to show good cause, that a peremptory writ issue.

The right to mandamus is ably and earnestly contested, the contention being that the complaint does not disclose such a clear and certain right to receive, on the one hand, or such plain and manifest duty to pay the sum demanded, on the other, as will warrant the issuance of the peremptory writ; that the indorsement of the orders as paid by a former treasurer, as required by §7998 Burns 1894, presented such grave doubt of a balance remaining unpaid as to justify a refusal to pay the demand until determined by some proper tribunal.

Mandamus is generally a proper remedy against a ministerial officer to require the performance of an act connected with the liability of the government, when there is no other adequate legal remedy, the demand definitely fixed, the government itself clearly liable, and the officer refuses to act. *Ingerman v. State*, 128 Ind. 225; *State v. Snodgrass*, 98 Ind. 546; *Henderson v. State*, 53 Ind. 60; *Hamilton v. State*, 3 Ind. 452, 457; *Burnsville Turnpike Co. v. State*, 119 Ind. 382, 384; *Rice v. State*, 95 Ind. 33; *State v. Coop-*

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rider, 96 Ind. 279; High Ex. Leg. Rem. §§100-117; *Moses on Mand.* p. 135.

It is the right exhibited, as contradistinguished from the evidence in support of it, that must be clear and certain. It will not do to say, as seems to be contended, that the right must be held in abeyance until the facts essential to its support have been first established before some proper officer or tribunal. The right may exist independent of the ability to prove it, and, when the relator exhibits a state of facts that entitles him to the alternative writ, if true, it is the duty of the court to award it; and, upon the return thereto, "issues of law and fact may be joined and like proceedings shall be had for the trial of issues and rendering judgment as in civil actions." §§1185, 1186 Burns 1894, §§1171, 1172 R. S. 1881 and Horner 1897.

At common law, the return to the alternative writ was conclusive as to the facts in that proceeding, and the sole remedy of the petitioner was to sue the defendant for a false return; but the right to traverse the return, form and try issues of fact, in all cases, is clearly contemplated by the statute, *supra*, and there can be no other purpose or end accomplished by the trial of issues than the judicial determination thereby whether a peremptory writ should issue in the particular case.

To entitle him to the writ, the relator was required to show: (1) That he had an interest in the subject-matter; (2) that the orders in controversy were in part unpaid; (3) that the amount unpaid was fixed and certain; (4) that there was sufficient money in the treasury liable to the payment, and (5) a prior demand and refusal of the defendant to pay. If these things were well pleaded, they constitute a *prima facie* case which is sufficient to withstand a demurrer for want of facts. *Board, etc., v. State*, 61 Ind. 379, 386.

It is insisted that mandamus will not lie to enforce a stale claim, and that the complaint is bad for showing a lapse of sixteen months after the action accrued before any step was

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taken by appellee to enforce it. As a rule, the question of laches, which falls short of the period of limitation for such actions, in the absence of averments showing that the present assertion of the right will in some way injure the defendant, can not be raised by demurrer. It is true, when it appears either from the complaint or answer that the plaintiff has slept upon his rights for an unreasonable time, relief by mandate, as a general rule, will be refused; but the mere delay for the time mentioned can not be considered as unreasonable, or laches of such a character as will alone defeat the action.

It is insisted that the complaint is bad for the further reason that appellee had an adequate remedy at law in a suit against the county. We do not think so. The basis of such right, or the form of the action, has not been pointed out, and we are unable to perceive any. The county, as such, has no beneficial interest in, or control over, the fund against which the orders were drawn. It occupies no fiduciary relation thereto. It is charged with no duty in respect to its disbursement or security. The money was placed by the State in the hands of the county treasurer under §5970 Burns 1894, and distributed to the school city of Elkhart by the county auditor under §5973 Burns 1894.

The county treasurer, in the receipt and disbursement of this fund, was exercising a State function, and in no sense was he such an agent of the county as will make the latter responsible for his acts. As was said in *Vigo Township v. Board, etc.*, 111 Ind. 170, at page 173: "In exercising these duties the officers exert a power delegated immediately to them by the State, for the benefit of all citizens who are affected by the sovereign power which pertains to the levying and collecting of taxes. The county as a municipality is not specially interested in the exercise of these powers, except so far as they relate to its own municipal affairs. It is, hence, not liable for derelictions of officers in respect to their conduct as mere agents of the government."

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The case of *Shelby Township v. Randles*, 57 Ind. 390, should not be construed as holding a contrary doctrine. In that case the township was held liable to a suit for damages by the owner of sheep killed by dogs. The fund applicable to the payment of such claims was created by the taxation of dogs in the particular township, under the act of 1865, chapter twelve, and was paid over and belonged exclusively to the township (section three), and if not all required to pay such claims, the surplus was disbursed by the township as school revenue (section four). The fund was created by and belonged to the township for a particular purpose, and it was its duty, enjoined by law, to disburse it through its trustee in the execution of that purpose, and, upon its refusal so to do, was liable to the party aggrieved.

It is quite true that a county may sue and be sued in many cases. As to such duties as are expressly imposed upon it by law, or as affect interests expressly committed to its charge, it may be made answerable for the default of the agents intrusted with the performance. "Liability in such cases", as was further said in the case already quoted from, "grows out of the fact that the municipality failed to discharge some corporate duty which the law expressly and primarily laid upon it, and not upon the officer or agent." See, also, *Board, etc., v. Allman*, 142 Ind. 573; *Conn v. Board, etc.*, 151 Ind. 517. Neither could appellee maintain an action on the official bond of the treasurer. *Taggart v. State*, 49 Ind. 47; *Yater v. State*, 58 Ind. 299; *Gauntt v. State*, 81 Ind. 137.

It is also urged that the complaint is insufficient for want of an averment of prior demand against the appellant to pay the balance due upon said orders. The petition and alternative writ aver that a prior demand was made of Delos N. Weaver as treasurer of Elkhart county, and who was at the time such officer, and by him as such officer refused; that, pending the action, Weaver's term expired, and appellant, Wood, succeeded him in the office January 1, 1899;

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which fact, being disclosed by a supplemental complaint, the court substituted Wood as the party defendant.

The office of county treasurer is a continuing one. The remedy sought was the payment of money by the officer,—a purely ministerial function. The demand was against Weaver, the officer, and not against Weaver, the individual, and when Weaver went out, and Wood went in, the party defendant was the same, but represented by another individual. Wood assumed the office impressed with all the legal duties and obligations that rested upon the officer he then was. He took the office *lis pendens*, and was bound to know the character of the plaintiff's action, and that the complaint charged that a demand of payment had been properly made of his predecessor, and refused, and if it was his pleasure to pay the plaintiff's demand without judicial determination, it was his duty to do so without further demand. To hold otherwise would be to place it in the power of such officers, by the expiration of terms of office and resignations, effectually to defeat the ends of justice. *State v. Gates*, 22 Wis. 210, 214; *Lindsey v. Auditor of Kentucky*, 3 Bush 231, 235; *Hardee v. Gibbs*, 50 Miss. 802, 806; *People v. Supervisor*, 100 Ill. 332; *Clark v. McKenzie*, 7 Bush 523, 531; *State v. Puckett*, 7 Lea 709, 711; *People v. Treasurer, etc.*, 37 Mich. 351; *Doolittle v. Selectmen*, 59 Conn. 402, 409; *People v. Bacon*, 18 Mich. 247, 253; *State v. Warner*, 55 Wis. 271, 285; High Ex. Leg. Rem. (3rd ed.), §§38, 441.

We are aware that the doctrine announced in *United States v. Boutwell*, 17 Wall. 604, and adhered to by that court to a recent date, is at variance with the view here expressed, but the rule laid down by the Federal Court, so far as we have observed, seems not to have been followed by any of the states, and also seems to be repugnant to the due administration of justice when applied to public officers of short tenure.

It is also insisted that the court erred in sustaining the

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demurrer to appellant's second paragraph of answer. In this answer it is alleged that the orders had stamped thereon the words and figures: "Paid June 3, 1897, William H. Holderman, Treasurer of Elkhart County;" that Holderman was then treasurer of the county, and after the orders were so stamped they were deposited by Holderman with the auditor of the county, where they remained as a part of the record of orders paid and canceled during the term of office of Holderman; that the relator borrowed said orders of the auditor only long enough to present and demand payment of a balance claimed to be due thereon from Weaver, as treasurer, and immediately thereafter returned the same to the office of the auditor and to the files of paid and canceled orders, where they still remain; that the defendant had no knowledge of the payment thereof other than that said orders were a part of the files and record of paid and canceled orders of said county, and that his predecessors in said office of county treasurer claimed that said orders were paid in full; that the fact of payment was asserted on one side, and denied on the other, as to \$5,900 of the amount thereof, and that the defendant could not safely pay said orders until the amount unpaid, if any, was first determined in an action for that purpose.

It is the opinion of the writer that this answer is insufficient. Its theory seems to be that facts exhibiting an uncertainty, rather than the fact of payment, will defeat the issuance of the peremptory writ. The answer would doubtless be good upon this theory if the statute did not provide the means for removing the uncertainty. But as in all other matters of dispute, as we have seen, issues of fact may be formed and tried in a mandamus proceeding, as in civil actions, and the final writ of performance granted or withheld according as the issues may be determined. The duty of performance must be made clear and certain before the act is compelled. Hence, the rule of safety and personal protection contended for does not apply where the doubt rests, not in the right, but in the issuable facts.

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The relator presents a complaint showing a clear legal right. If the complaint is true the defendant is entitled to no protection; if it is not true he will be awarded protection by a denial of the peremptory writ. There is no denial of the non-payment charged, nor that there is sufficient money in the treasury liable to the payment. The defendant is the custodian of the office and supervisor and keeper of its accounts. He must know that the orders were drawn against a special fund distributed to the city of Elkhart, and is also bound to know whether there is still in the treasury \$5,900 of money liable to the payment of the orders. The sum necessary and liable to the payment can be in the treasury but once, and if the accounts show that any part of it is still there, then it follows that that part has never been paid out.

The relator proposes by his complaint to assume the burden of proving (1) that \$5,900 of the distribution remains unpaid, notwithstanding the indorsement upon the orders as paid in full, and (2) that the money liable to the payment of this balance still remains in the treasury. Before he will be entitled to a peremptory writ he will be required to prove clearly the existence of both these facts. The suit is against the officer, not against the individual, and if it is made clearly to appear, from judicial investigation under proper issues, that the officer holds money belonging to the city, I perceive no just ground for a denial of the writ. The answer in question, failing to traverse these material facts, and impliedly confessing them to be true, I think is insufficient.

The majority of the court, however, takes the opposite view, expressed as follows: "Section 1182 Burns 1894, §1168 R. S. 1881 and Horner 1897, provides that 'Writs of mandate may be issued to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, or a duty resulting from an office, trust, or station'. The writ of mandamus should not issue

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unless a clear legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced, is shown. High Ex. Leg. Rem. (3rd ed.), §9; *Commissioners v. People*, 66 Ill. 339, 341; *People v. Hatch*, 33 Ill. 9, 140; *People v. Klokke*, 92 Ill. 134, 137, 138; *People, etc., v. Spruance, etc.*, 8 Col. 307, 319; *Mayor v. Aspen, etc., Co.*, 10 Col. 191, 199.

“The question presented, therefore, by the demurrer to the second paragraph of answer is not whether or not such orders were paid, but was it, under the facts alleged in said paragraph, considered in connection with the allegations of the complaint and alternative writ, the clear legal duty of Weaver, appellant’s predecessor in office, to pay such orders on the alleged demand of the relator?

“It is well settled in this State that money can only be paid out of the county treasury in the manner provided by law. *Shoemaker v. Board, etc.*, 36 Ind. 175, 184. Section 7998 Burns 1894, §5920 R. S. 1881 and Horner 1897, provides that the county treasurer ‘shall pay all orders of the auditor when presented, if there be money in the treasury for that purpose, and write on the face of such order the date of redemption, over his signature. If there be no funds to pay such order when presented, he shall endorse thereon “Not paid for want of funds” and the date of such presentment. over his signature; which shall entitle such order to draw, thenceforth, legal interest.’

“Section 8001 Burns 1894, §5923 R. S. 1881 and Horner 1897, provides that ‘The treasurer shall, on the first Monday of March, June, September and December, in each year, deposit with the auditor all orders redeemed, who shall receipt therefor.’

“It is evident that it is not the duty of a county treasurer to pay an ‘order of the auditor’ unless it is legal on its face, and is presented by a person having authority to receive the money thereon, and there is an appropriate fund in the treasury sufficient for that purpose. An order, legal on its

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face, is an absolute protection to the treasurer when paid even though invalid, if when he paid it he had no notice or knowledge of its invalidity. *Graham v. State*, 66 Ind. 386, 391, 392.

“As the treasurer is required by said §7998 (5920) *supra*, to write on the face of all orders ‘Paid’, the date of redemption over his signature, and by §8001 (5923) *supra*, to deposit with the county auditor all redeemed orders and take the receipt therefor, he is not required to pay an order unless the person who presents it has the lawful possession thereof for the purpose of receiving payment, and the right to surrender the possession thereof to the treasurer when paid. This is true because it is only when the treasurer, upon payment of an order, is entitled to retain the same against all persons, and deposit it in the auditor’s office, and receive a receipt therefor, and thus be entitled to credit for such payment, that he is required to pay it.

“Said orders were in the possession of the auditor of said county as paid and canceled orders deposited there as paid by Holderman, treasurer, and, under such circumstances it is to be presumed that he had paid the same. The relator obtained said orders from the files of paid and canceled orders in the auditor’s office under an agreement to return them to the files of said office. He did not, therefore, have the lawful possession thereof for the purpose of receiving payment, and the delivery of said orders to the treasurer, on payment, would have been a violation of the agreement under which the relator obtained the same from the auditor’s office. If said orders had been paid to the relator upon his demand, the treasurer, upon depositing the same in the auditor’s office, could not have compelled the auditor to give him a receipt therefor, because said orders were already a part of the files of said auditor’s office. The demand made by the relator for the payment of said orders was the same as if the orders had been on file in the auditor’s office as paid and canceled orders when said demand was made.

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“Under §7998 (5920) *supra*, it is not the duty of a county treasurer to pay an order of the auditor unless the order is delivered to him so that he can mark it redeemed, as required by said section, and deposit it with the auditor, and receive a receipt therefor, as provided in §8001 (5923) *supra*, and thereby be entitled to a credit for such payment.

“As under the facts alleged in said second paragraph of answer it was not the clear legal duty of the treasurer to pay such orders on the demand of the relator, it is shown thereby that a peremptory writ should not issue to compel appellant to pay said orders. Moreover, the peremptory writ, properly framed, would only require the appellant to pay said orders when presented by the relator; and the answer shows that he did not have possession of the orders, and could not present them for payment. Said second paragraph, therefore, shows that the relator is not in a position to avail himself of the writ if granted. It is a complete defense to such proceeding that the writ would be nugatory if granted. High, Ex. Leg. Rem. (3rd ed.), §§14, 117; 13 Ency. Pl. & Pr. 493, 494.”

As arising under the motion for a new trial, it is admitted by appellee in his brief that the court excluded, over appellant's objection and exception, testimony tending to prove that there was no money in the treasury at the time the demand for payment was made upon Weaver that could be used in payment. This was clearly error. The fact that there was money in the treasury liable to the payment of the orders when the demand was made rests at the foundation of the relator's right to the writ. The court will not undertake to compel a public officer to do a thing that is impossible of performance. The orders were not payable out of the general fund, nor out of any fund other than that particularly provided by the distribution of the auditor for that purpose more than a year before, and during the administration of the office by a different treasurer. The law presumes that public officers perform the duties required of

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them by law. The complaint charges that each order had stamped upon it: "Paid June 3, 1897. William H. Holderman, Treasurer of Elkhart County."

Section 7998, *supra*, provides that "the treasurer shall pay all orders of the auditor when presented, if there be money in the treasury for that purpose, and write across the face of such orders the date of redemption, over his signature." In the absence of an averment to the contrary, we must presume against the pleader, that, at the time the orders were stamped "Paid", they were delivered to Holderman by appellee's agent as paid, and by Holderman placed and used as appointed by law. And when non-payment is set up against this state of facts, and against a successor in office, sixteen months afterward, the plaintiff must affirmatively prove, as essential facts of his case, not only the non-payment, but that at the time payment is demanded the money liable to the payment is still in the treasury.

It is contended that when it is once shown that the money was in the treasury at the time the orders were drawn by the auditor, it must be conclusively presumed therefrom, even against a successor in office, that the money remains in the treasury till paid out according to law. We can not assent to this contention. If Holderman appropriated the money to his own use, and deported it from the treasury, then as a fact it was not there when the demand was made, and payment could not have been made by Weaver. Courts will not indulge in fiction in ordering peremptory writs of mandate. Facts, and not presumptions, are required. Without some affirmative evidence that the money liable to the payment was still in the treasury when the demand of payment was made, appellee had failed to make out his case, and the court should have directed a verdict for the defendant. If any such evidence was before the jury, it was the undoubted right of appellant to rebut it, and show the contrary, if he could.

Appellee assigns as cross-error the overruling of his de-

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murrer to the first paragraph of answer. This answer traversed the averments of the complaint that \$5,900, or any other sum, was unpaid upon the orders, and also that the money liable to the payment was in the treasury at the time the demand was made. It was good as an argumentative denial, and, in the absence of a paragraph of general denial, the demurrer was properly overruled.

There are other questions discussed, the decision of which is not necessary to a disposition of the case, and, as they are not likely to arise again upon a retrial, we pass them without consideration. Judgment reversed, with instructions to grant a new trial and overrule the demurrer to the second paragraph of the answer. Baker, J., did not participate.

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[No. 18,966. Filed April 4, 1900. Rehearing denied June 5, 1900]

APPEAL AND ERROR.—Motion in Arrest of Judgment.—Record.—

Criminal Law.—A motion in arrest of judgment in a criminal case, and the ruling of the court thereon, are a part of the record on appeal without a bill of exceptions, and where such matters are only exhibited in a bill of exceptions, copied in the transcript, and do not appear elsewhere in the transcript, they will not be considered on appeal. *pp. 16, 17.*

SAME.—Bill of Exceptions.—Criminal Law.—It must affirmatively appear from the record that the bill of exceptions in a criminal case was filed with the clerk; the filing cannot be shown by mere recitals in the bill, or by the file mark of the clerk thereon. *pp. 16, 17.*

SAME.—Motion in Arrest of Judgment.—When not in Record.—Presumption.—Criminal Law.—Where a motion in arrest of judgment because of a defect in the indictment is not in the record on appeal, it will be presumed that the motion did not reach the defect, if any, in the indictment, and was properly overruled for that reason, or that the causes assigned for arresting the judgment were so defectively stated as to present no question. *p. 17.*

From the Vanderburgh Circuit Court. *Affirmed.*

W. W. Ireland and W. Reister, for appellant.

W. L. Taylor, Attorney-General, Merrill Moores, C. C. Hadley and A. J. Clark, for State.

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155	15
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168	432

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MONKS, J.—The only error assigned is that the court below erred in overruling appellant's motion in arrest of judgment.

The Attorney-General insists that the motion in arrest is not in the record, (1) for the reason that it is not set forth in the record proper, but only appears in the bill of exceptions; (2) if it could be thus made a part of the record, the transcript does not affirmatively show that the bill of exceptions was ever filed,—and that no question is, therefore, presented for our consideration by the assignment of error. Section 1912 Burns 1894, §1843 R. S. 1881 and Horner 1897, provides that in a criminal prosecution motions in arrest shall be in writing, and shall state the causes therefor. *Chandler v. State*, 141 Ind. 106, 108, 109. A motion in arrest of judgment in a criminal case and the ruling of the court thereon are a part of the record, the same as a motion for a new trial and the ruling thereon, without a bill of exceptions. *Chandler v. State, supra*. A written motion in arrest of judgment and the ruling thereon are contained in what purports to be a bill of exceptions, but no motion in arrest is set forth in any other part of the transcript. It is settled that bills of exceptions cannot bring into the record matters which are a part of the record without a bill of exceptions. 3 Ency. Pl. & Pr. 404-406; *Home, etc., Co. v. Globe, etc., Co.*, 146 Ind. 673, 681. When matters properly a part of the record without a bill of exceptions are only exhibited in a bill of exceptions copied into the transcript, and do not appear elsewhere in the transcript, they will not be considered on appeal. *Home, etc., Co. v. Globe, etc., Co., supra*. Moreover if the motion in arrest of judgment could properly have been made a part of the record by a bill of exceptions, the same is not a part of the record in this case, for the reason that the transcript does not show that the bill of exceptions was ever filed as required by §1916 Burns 1894, §1847 R. S. 1881 and Horner 1897. Unless the bill of exceptions was filed

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by the clerk, and this fact is affirmatively shown by the record, it forms no part of the record, and cannot be considered. *Stewart v. State*, 113 Ind. 505, 509, 510. The filing cannot be shown in this court by mere recitals in the bill or by the file mark of the clerk thereon. *Drake v. State*, 145 Ind. 210, 217; *Shewalter v. Bergman*, 132 Ind. 556; *Board, ac., v. Huffman*, 134 Ind. 1, 7, 8.

It is presumed that the action of the trial court was correct in overruling said motion in arrest, and this presumption can only be overcome by a record which shows unequivocally that an error was committed. The motion in arrest not being in the record, we do not know, and cannot presume, that it stated any cause for arresting the judgment or that it was otherwise so framed that it was error to overrule it, even if the indictment was not sufficient to withstand a motion in arrest properly framed. *Aydelott v. Collings*, 144 Ind. 602, 603, 604; *Head v. Doehleman*, 148 Ind. 145, 146; *Dunn v. Dunn*, 149 Ind. 424, 425; *Sharpe v. Dillman*, 77 Ind. 280. This is true, because, if anything is left to conjecture, all doubts must be solved in favor of the action of the trial court, and this court will adopt the presumption which upholds the judgment appealed from. *Ewbank's Manual* §198; *Elliott's App. Proc.* §§709, 710, 720.

In the absence from the record of said motion in arrest, the presumption, therefore, is that the same did not reach the defect, if any, in the indictment, and was properly overruled for that reason, or that the causes assigned for arresting the judgment were so defectively stated as to present no question. *Zimmerman v. Gaumer*, 152 Ind. 552, 555, 556, and cases cited.

Finding no available error in the record, the judgment is affirmed.

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**TOWN OF NEW CASTLE v. THE LAKE ERIE AND WEST-
ERN RAILROAD COMPANY ET AL.**

[No. 18,743. Filed June 6, 1900.]

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160	602

RAILROADS. — *Occupation of Streets.* — *Removal.* — *Municipal Corporations.* — *Pleading.* — In an action by a town to compel a railroad company to remove its tracks from a street, an answer that defendant had used the tracks complained of by leave and license of the town for more than thirty years, and had expended large sums of money in building, maintaining, and equipping the same, with full knowledge and consent of plaintiff, is not bad for failure to justify the use of the tracks for switching, yard, and storage purposes, where the complaint does not show any use of the street for switching, yard, and storage purposes that would necessarily be unlawful, except on the basis that defendant had no right in the street at all. *pp. 18-22.*

SAME. — *Occupation of Streets.* — *Municipal Corporations.* — Section 5153 Burns 1894 relating to the general powers of railroad companies to construct their roads does not authorize such companies to lay their tracks longitudinally upon the streets of a municipality without its consent or over its objection. *pp. 22-25.*

MUNICIPAL CORPORATIONS. — *Railroads.* — *Occupation of Streets.* — Municipal corporations, under their general powers, have authority to grant railroad companies the right to lay their tracks longitudinally upon a street, provided that the use does not destroy or unreasonably impair the street as a highway for the general public. *pp. 22-25.*

RAILROADS. — *Occupation of Streets.* — *Adverse Possession.* — *Presumption.* — *Municipal Corporations.* — The occupation of the streets of a municipality by a railroad company with its tracks for a period of thirty years under such circumstances as to amount to adverse possession raises the presumption of a grant. *pp. 25, 26.*

From the Hancock Circuit Court. *Affirmed.*

M. E. Forkner, E. Marsh and W. W. Cook, for appellant.
J. B. Cockrum, E. H. Bundy, W. A. Brown and W. E. Hackedorn, for appellees.

BAKER, C. J. — Suit by appellant to compel appellees to remove their railroad tracks from a street. The complaint in substance alleges that Locust street as originally platted

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was fifty feet wide and ran north and south from the north line of the original plat of the town of New Castle to Broad street, which was the second cross-street south; that Locust street has been continuously, for more than sixty-five years, opened, improved and maintained as a public street of the town; that the appellees and their grantors without right entered upon the street and constructed and maintained and appellees now maintain and operate a permanent side-track in and along the east side of the street from its northern terminus to Broad street; that they without right constructed and now maintain a permanent side-track from the northern terminus of Locust street, crossing the alley entering Locust street at the northern terminus, and running south bearing to the west, along the west side of Locust street to within the limits of the street, a distance of 350 feet; that, by the construction and maintenance of the side-tracks, the northern terminus of the street and the alley entering therein are wholly obstructed; that appellees use the tracks for switching, yard, and storage purposes, standing their cars across the alley and encroaching upon Locust street, limiting its width by the extent of the widths of the side-tracks; that the side-tracks constitute a permanent and unlawful obstruction of Locust street and the intersecting streets and alleys, and are a nuisance to the citizens of the town and the public in general, and by reason thereof the street can not be properly improved and can not be used for the ordinary purposes of a street; that appellees have been duly notified to remove their tracks without the limits of the street but have failed and refused to remove them, and claim the right to maintain their tracks within the limits of the street and to use the same and appropriate the street to their exclusive use, to the injury of all the citizens of the town and the public generally; that to allow their tracks to remain in the street will permanently obstruct the street and the travel thereon and will be a permanent and lasting injury to the general public and the citizens of the town. Answer in

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general denial and two affirmative paragraphs. Demurrer to each affirmative answer overruled. Reply in denial. Trial by court. Special finding of facts and conclusions of law. Exceptions reserved to each adverse ruling. The errors assigned are: Overruling appellant's demurrers to the affirmative answers; overruling motion for a new trial; and that the court erred in its conclusions of law stated on the special finding of facts.

The second paragraph of answer avers, "that appellees, for more than thirty years, have used and maintained the side-tracks and switches named in the complaint by leave and license of the town of New Castle and have expended large sums of money in building, maintaining and equipping said side-tracks and switches with full knowledge and consent of the plaintiff and without objection on her part." Appellant claims that this answer does not meet the complaint, because it neither denies nor justifies the use of the tracks "for switching, yard, and storage purposes". The complaint shows that the town demanded that appellees remove their tracks from the street, and that appellees refused because they claimed to have lawful right to maintain their tracks in the street. The complaint does not show any use of the street for switching, yard, and storage purposes that would necessarily be unlawful except on the basis that appellees have no right in the street at all. If appellees had a valid right to use the street, the town's governmental and police powers would not be abated nor diminished. Elliott on Railroads §1082. The complaint, however, is not based on appellees' refusal to obey regulations of the use, but is founded on the claim of appellees' usurpation. Therefore, this paragraph is not a partial answer.

In substance the third paragraph of answer is: That in 1868, appellees' predecessors constructed a side-track, 300 feet in length, along the west side of Locust street from the main line of appellees' railroad, at the northern terminus of Locust street, to Vine street, which was the first

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cross-street south; that at the same time appellees' predecessors built another side-track along the east edge of Locust street from the north end of Locust street, where it crosses appellees' main track, south to the north line of Broad street; that in order to build this track they were compelled to and did build a high embankment on and along the east side of Locust street and lay its tracks on the embankment thus built; that the track was laid in 1866 and forms the west bank of a ravine; that they had since that time kept up and maintained the side-tracks at a large expenditure of money without any objection by appellant; that the side-tracks are not now and never have been any impediment or obstruction to the free use of Locust street by the general public; that the side-tracks were built at a great cost and have been maintained and repaired at a large expense each year since; that they are now and always have been necessary to the proper management of appellees' road and its business; that for more than thirty years appellant has stood by with full knowledge of all the facts without any objection.

The court found the existence of Locust street as stated in the complaint; that the street was laid out on the edge of a ravine; that in 1868 appellees' predecessor built a side-track along the east side of Locust street, and within the platted limits thereof, by constructing an embankment from ten to twelve feet high, which was on a level with the street and formed a bed and retaining wall for the street; that this east side-track did not encroach upon the traveled portion of the street and has never interfered with nor diminished the travel upon the street or the means of travel thereon; that in 1868 appellees' predecessor built a depot and platform, upon piling, in the ravine, just east of this east side-track, which has been continuously used as a freight depot since 1869; that about the same time appellees' predecessor constructed its west side-track, but no part thereof is now or ever has been within the limits of Locust street

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except forty feet of the east rail at the south end; that all that part of Locust street lying west of the west rail of the east side-track is of the average width of thirty-six feet and is convenient for travel; that the side-tracks were constructed at a cost of \$2,000 and the depot \$800 and have been maintained at an annual expense of \$280; that the side-tracks have been used in the ordinary course of business and in a reasonable and proper manner; that the side-tracks and depot have been regularly listed for taxation for State, county and municipal purposes; that neither the town nor any of its officers has ever made any objection to the side-tracks being so located or to the uses made thereof, but the town and its officers have stood by for more than thirty years, having full knowledge that the companies had expended their money in constructing and maintaining the side-tracks and depot, and exacting municipal taxes thereon. On these facts, the court concluded that the law was with the appellees.

Appellant claims that, under the third paragraph of answer and the finding of facts, appellees have no right to maintain their side-tracks in Locust street. Appellees contend, (1) that the statute for the organization of railroad companies gives them the right to go upon streets without the consent of the municipality, and (2) that, if a grant from the municipality were necessary, appellant is estopped from denying that a grant exists.

The fifth subdivision of §5153 Burns 1894, §3903 R. S. 1881 and Horner 1897, relating to the general powers of railroad companies, reads: "To construct its road upon or across any stream of water, water course, road, highway, railroad or canal, so as not to interfere with the free use of the same, which the route of its road shall *intersect*, in such manner as to afford security for life and property; but the corporation shall restore the stream or water course, road or highway, *thus intersected*, to its former state, or in a sufficient manner not to unnecessarily impair its usefulness

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or injure its franchise." The control of streets, as well as of all other public highways, is primarily in the legislature. But the legislature has delegated to municipalities the exclusive control of their streets and alleys. As the legislature gave, so that body may take away or modify the power. There is no doubt of the legislature's authority to grant railroad companies the right to lay their tracks longitudinally upon the streets of a municipality without its consent or over its objection. Dillon's Mun. Corp. §701; Elliott on Railroads §1076; *City of Clinton v. Cedar Rapids, etc., R. Co.*, 24 Iowa 455; *Chicago, etc., R. Co. v. Town of Newton*, 36 Iowa 299; *Ingram v. Chicago, etc., R. Co.*, 38 Iowa 669; *Cook v. Chicago, etc., R. Co.*, 83 Iowa 278, 49 N. W. 92; *Borough of Millvale v. Evergreen R. Co.*, 131 Pa. St. 1, 18 Atl. 993, 7 L. R. A. 369. The question is, to what extent does the statute above quoted impair the control of a municipality over its own streets. If the words "To construct its road *upon* or across any highway" were not limited by any other parts of the sentence, it might be claimed that railroad companies were given the right to go upon highways longitudinally. But they are limited to going upon or across any highway *that their railroads intersect*, and are commanded to restore to its former state, as nearly as practicable, any highway *thus intersected*. The legislature may well have believed that it was proper and necessary for railroad companies to have the right to cross streets without the consent of the municipality, and at the same time that it was neither proper nor necessary for them to have the power to occupy streets longitudinally. And the sentence as a whole indicates that such was the legislative intent. The word "upon" is not eliminated by this construction, for the legislature, if it chose, might have restricted the right to cross a highway to going under or over it, and not upon it at grade.

"The usual and ordinary powers of municipal corporations to regulate streets and keep them free from obstruc-

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tions are not sufficient, it is believed, to empower them to authorize the use thereof for the purpose of constructing and operating thereon a *steam* railway," as these "powers are not to be enlarged by construction, and were not conferred for this purpose." Dillon Mun. Corp. §705. If the question were an open one in this State, it would be well to inquire if Dillon has not enunciated the correct rule. But, by a long line of decisions, it seems to have been thoroughly settled that municipalities in this State, under their general powers, have authority to grant railroad companies the right to lay their tracks longitudinally upon a street, provided that the use does not destroy nor unreasonably impair the street as a highway for the general public. Elliott on Railroads §1089. In *Tate v. Ohio, etc., R. Co.*, 7 Ind. 479, it was said: "Nor is it intended to intimate that it is not in the power of the city to authorize the railroad company to lay a track at the grade of Williams street, and thus use it for the passage of their cars, in common with other public and private conveyances. To that extent the municipal authority may be conceded." The court said in *Indianapolis, etc., R. Co. v. State*, 37 Ind. 489: "We are of the opinion that the common council of a city have no authority to make contracts for the sale or letting of any public street or any portion thereof. They may, it is true, grant an easement in the street to a railroad company, to use the street in common with the public." From *Burkham v. Ohio, etc., R. Co.*, 122 Ind. 344: "We have no doubt that an abutting owner has a proprietary right in the street of which he cannot be deprived without compensation. But it by no means follows from this that a city in granting a right to a railroad company to use a street deprives the abutter of his property. The grant by the municipal corporation transfers no proprietary rights of the abutter, it simply grants the privilege the city has power to grant. In granting such a privilege a city exercises a power delegated to it by the sovereign, and it is not liable for exercising such a power."

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The same doctrine is expressly or impliedly recognized in the following cases: *Protzman v. Indianapolis, etc., R. Co.*, 9 Ind. 467, 68 Am. Dec. 650; *Indiana, etc., R. Co. v. Boden*, 10 Ind. 96; *New Albany, etc., R. Co. v. O'Daily*, 12 Ind. 551; *Cox v. Louisville, etc., R. Co.*, 48 Ind. 178; *Indianapolis, etc., R. Co. v. Smith*, 52 Ind. 428; *Terre Haute, etc., R. Co. v. Scott*, 74 Ind. 29; *State v. Louisville, etc., R. Co.*, 86 Ind. 114; *Kistner v. City of Indianapolis*, 100 Ind. 210; *White v. Chicago, etc., R. Co.*, 122 Ind. 317, 7 L. R. A. 257; *Chicago, etc., R. Co. v. Eisert*, 127 Ind. 156; *Haus v. Jeffersonville, etc., R. Co.*, 138 Ind. 307. These decisions cover a period of more than forty years, and the doctrine has become a rule of property. Nearly every town and city in the State has a railroad running longitudinally along some street. It is too late now to inquire into the justness and validity of the rule.

The finding does not state that appellees' predecessor entered upon Locust street under a grant from the municipality. From this appellant argues that the tracks are now unlawfully in the street, and that the town is not estopped from requiring their removal. It is true that the facts pleaded in the third paragraph of answer and the facts found by the court do not constitute an estoppel by conduct. There was no concealment nor misrepresentation by the town. Nor did the other elements of estoppel by conduct exist. *Abicht v. Searls*, 154 Ind. 594. But the question is whether appellant is not estopped by its laches, that is, whether appellees have not acquired a prescriptive right. Appellant says that the construction and maintenance of the tracks in the street, without an express grant from the town, constituted a public nuisance *per se*; and that no right by prescription could be acquired. A particular method of construction or operation may be a nuisance, but the mere fact that a railroad is constructed in a street does not make it a nuisance. *State v. Louisville, etc., R. Co.*, 86 Ind. 114. The legislature has given the company the

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power to accept and the municipality to grant the right to lay tracks in the street. *City of Valparaiso v. Bozarth*, 153 Ind. 536, and the cases therein cited, which hold that a structure built upon a street by a private person is a public nuisance *per se* and that no prescriptive right would accrue from any length of user, are not applicable. The private structure is a nuisance *per se* because the law would not permit the municipality to authorize its erection. Prescription is the presumption of a grant. There can be no presumption of a grant, if the alleged grantor is lacking in legal capacity and if the subject-matter of the grant is unlawful. No length of user would give a railroad company the absolute ownership of a street, for that is not the municipality's to grant. *Indianapolis, etc., R. Co. v. Ross*, 47 Ind. 25. But property that a municipality has the power to convey may be acquired from it by prescription. *City of Bedford v. Willard*, 133 Ind. 562, 36 Am. St. 563, and note. In *Jorgensen v. Squires*, 144 N. Y. 280, 39 N. E. 373, and in *People v. Collis*, 45 N. Y. Supp. 282, it was held that, the legislature having authorized municipalities to grant property owners the right to build and maintain certain structures in the streets, the continued use of such a structure for more than twenty years, with the knowledge and acquiescence of the municipality, raised the conclusive presumption of a grant.

If the grant in this case be considered in the nature of a mere license, it has become irrevocable by reason of appellees' expenditures, with the knowledge of appellant. *Buchanan v. Logansport, etc., R. Co.*, 71 Ind. 265; *Joseph v. Wild*, 146 Ind. 249, and cases there collated.

None of the matters presented in the motion for a new trial is material. The controlling facts in the case are undisputed. Appellees' possession extended over a period of thirty years; it was peaceable; it was continuous; it was open and known to appellant. It was exclusive to the same extent it would have been exclusive under an express grant,

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that is, the town by an express grant could not deprive itself of governmental and police powers over the part of the street occupied by the tracks. It was adverse, that is, the use was such as would have exposed appellees, at any time within twenty years, to an action, if in fact they did not have an express grant, and the open dominion of the tracks and the return thereof for taxation were as high evidences of a claim of right as any that would follow possession under an express grant.

Judgment affirmed.

THE TERRE HAUTE AND LOGANSPOUT RAILWAY COMPANY
v. THE ST. JOSEPH, SOUTH BEND AND SOUTH-
ERN RAILROAD COMPANY, ET AL.

[No. 19,875. Filed June 6, 1900.]

APPEAL AND ERROR.—*Temporary Restraining Order.—Interlocutory Order.—Injunction.*—Where a temporary restraining order was issued restraining defendants "until notice of an application for a temporary injunction can be given, and such application heard and determined," providing that the application for a temporary injunction would be heard on a certain day, and on the day set for hearing the application was continued by agreement of the parties until the first day of the next term, the temporary restraining order to continue in force until the further order of the court, the order of the court, upon a hearing of the application for a temporary injunction, that "the court having heard the motion for a temporary injunction, etc., and being fully advised in the premises, the application of the said plaintiff for a temporary injunction herein is now refused by the court, and the prior order granting a temporary injunction is set aside, and said order dissolved," amounts to an interlocutory order denying a temporary injunction and vacating a temporary restraining order theretofore issued, and is unappealable.

From the St. Joseph Circuit Court. *Appeal dismissed.*

J. G. Williams, for appellant.

A. L. Mason and Cary & Walker, for appellees.

BAKER, C. J.—Appellees' motion to dismiss rests upon the contention that appellant is complaining of an interlocutory order from which no appeal lies.

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A complaint was filed in which appellant sought (1) a temporary restraining order without notice or hearing by reason of the existence of an emergency therefor, (2) a temporary injunction after notice and hearing to continue unless sooner dissolved on motion until the final decree should be made, and (3) a final decree for a perpetual injunction. This complaint was filed on March 3, 1900, and was supported by affidavits of the existence of an emergency. On that day the judge in vacation issued a temporary restraining order, restraining the defendants "until notice of an application for a temporary injunction can be given, and such application heard and determined." The order further provided "that an application for a temporary injunction herein will be heard at the court-house * * * on the 15th day of March, 1900". This order was duly served upon appellees, and they appeared on the day named and filed demurrers to the complaint. As the appellees were not then ready to have the court hear and determine the application for a temporary injunction, an agreement of the parties was entered of record that the hearing on the application for a temporary injunction should be postponed until May 7, 1900, the first day of the next term, and that the temporary restraining order theretofore issued should continue in force until the further order of the court. Upon this agreement the court entered an order postponing the hearing on the application for a temporary injunction to the first day of the next term and continuing the temporary restraining order in force "until the further order of the court". On the first day of the May term, nothing was done; but on the second day, May 8, 1900, the application for a temporary injunction was heard, and the court made the following order: "And the court having heard the motion for a temporary injunction and the affidavits filed and being fully advised in the premises, the application of the said plaintiff for a temporary injunction herein is now refused by the court, and the prior order granting a temporary injunction is set aside and said injunction dissolved".

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The third subdivision of §658 Burns 1894, §646 R. S. 1881 and Horner 1897, authorizes appeals from interlocutory orders "granting or dissolving, or overruling motions to dissolve, an injunction in term, and granting an injunction in vacation". It is perfectly obvious that this statute refers to temporary injunctions, and applies neither to perpetual injunctions nor to temporary restraining orders. This is not questioned by counsel on either side; but appellant contends that the order of May 8th is an interlocutory order dissolving a temporary injunction, while appellees insist that it is an interlocutory order refusing a temporary injunction and dissolving a temporary restraining order that was in force pending the hearing on the application for a temporary injunction.

The claim of appellant is based on the fact that the order of May 8th reads that "the prior order granting a temporary *injunction* is set aside and said *injunction* dissolved" and also on the fact that the order of March 15th continued in force the temporary restraining order issued on March 3rd, "until the further order of the court". In determining the sense and scope of these orders, it is not permissible to isolate particular words and take their abstract meaning as decisive. But the full context of the orders should be examined in connection with the subject-matter of the questions that were being presented to the court to act upon.

It is true that the words "until the further order of the court" taken alone would indicate a temporary injunction rather than a temporary restraining order. But the order of March 15th taken as an entirety, shows that on the day fixed for the hearing on the application for a temporary injunction the hearing was postponed to May 7th, and the temporary restraining order, issued on March 3rd, without notice and without a hearing, was continued in force "until the further order of the court". The order further shows that this was done upon the stipulation of the parties. Though the hearing on the application for a temporary injunction

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was postponed to a day certain, it was not certain that the matter could then be heard. And in fact it was not heard until the next day. Surely it was competent for the parties to agree that an order should be made to continue the temporary restraining order in force until the application for a temporary injunction should be acted upon. The hearing was postponed to May 7th, but if the temporary restraining order had been limited by its terms to expire on May 7th, then appellees would have been free to transgress appellant's alleged rights between that date and such time as the court could regularly take up and pass upon the application for a temporary injunction. In the light of what was presented to the court to act upon and of the context, it is evident that the temporary restraining order was to continue in force until the order of the court was made for or against a temporary injunction.

The words in the order of May 8th that the "temporary *injunction* is set aside and said *injunction* dissolved" indicate an appealable interlocutory order. But there are two considerations that prove that by mistake the word *injunction* was used in the place of restraining order. One is that the order reads "and the *prior* order granting a temporary *injunction* is set aside". The prior order was the temporary restraining order of March 3rd, which on March 15th was continued in force until a hearing could be had on the question of granting a temporary *injunction*. The other is that no hearing on the question of granting a temporary *injunction* was had until May 8th, and that then the application was denied. The infallible distinction between a temporary restraining order and a temporary *injunction* is that the former issues without notice on a showing of emergency and the latter issues only after notice and hearing. §§1164, 1165 Burns 1894, §§1150, 1151 R. S. 1881 and Horner 1897.

An interlocutory order denying a temporary *injunction* and vacating a temporary restraining order theretofore is-

In Re Ray.

sued is unappealable. *Wallace v. McVey*, 6 Ind. 300; *Flagg v. Sloan*, 16 Ind. 432; *Cincinnati, etc., R. Co. v. Huncheon*, 16 Ind. 436; *Andrews v. Powell*, 27 Ind. 303; *Bronenberg v. Board, etc.*, 41 Ind. 502; *Pleasants v. Veray, etc., Co.*, 42 Ind. 391; *Ogle v. Dill*, 55 Ind. 130; Elliott's App. Proc. §106; Ewbank's Manual §86.

Appeal dismissed.

IN RE RAY.

[No. 19,309. Filed May 8, 1900. Rehearing denied June 6, 1900.]

APPEAL AND ERROR.—Interlocutory Order.—Contempt.—Depositions.

—*Witnesses.*—An order of court made under the provisions of §420 Burns 1894 requiring a witness to appear before an officer and give his deposition is an interlocutory order, and not a final order from which an appeal will lie.

From the Shelby Circuit Court. *Appeal dismissed.*

A. F. Wray and *T. H. Campbell*, for appellant.

Peter Crumpacker, *T. B. Adams* and *Isaac Carter*, for appellee.

DOWLING, J.—The deposition of the appellant was taken on behalf of certain plaintiffs in an action against North School Township, of Lake county, Indiana, pending in the Porter Circuit Court.

The defendant not having been present when the witness was examined, it afterwards obtained the leave of the court to cross-examine him upon the matters contained in his deposition, reasonable notice being first given. Notice of the time and place of the proposed cross-examination was given by the defendant to the plaintiffs in the said action, and Frank Glessner, the clerk of the Shelby Circuit Court, the officer selected to take the deposition, caused the appellant to be subpoenaed to appear before him on December 30, 1898, at 10 o'clock a. m., at the office of the said clerk, to testify and give his deposition in the said cause of McKay

In Re Ray.

et al. v. North School Township, etc. The appellant failed to appear as required, and Mr. Glessner, the clerk, reported the fact to the Shelby Circuit Court, agreeably to the provisions of §430 Burns 1894, and in his report asked the court to order the witness to attend and testify. Appellant appeared to the report, and filed a demurrer to it, which was overruled. He then filed a verified answer in explanation of his failure to attend and testify. On motion of Mr. Glessner, the answer was stricken out.

The court thereupon made the following order: "It is ordered by the court that George M. Ray be and appear at the office of the clerk of this court, in the court-house, in the city of Shelbyville, in Shelby county, Indiana, at 10 o'clock a. m. on the 5th day of July, 1899, before some officer authorized to take depositions, and then and there, before such officer, submit to a cross-examination by the defendant, North School Township of Lake county, Indiana, upon the matters and things to, and about which, he testified in his deposition heretofore given and taken in behalf of the plaintiffs, in the case of Thomas McKay *et al.* plaintiffs, v. North School Township, of Lake county, Indiana, which cause is now pending in the Porter Circuit Court of Indiana, and then and there to be cross-examined by said defendant about and concerning the matters and things about which he testified in said former deposition, all in compliance with the leave granted to the said defendant township by said Porter Circuit Court."

Exceptions were taken by the appellant to the several rulings of the court, and his bill of exceptions was filed within the time allowed for that purpose. From the foregoing order, directing him to appear and testify, the witness, Ray, appeals.

The right of appeal exists only where it is conferred by statute. Elliott's App. Proc. §75, and cases cited in note one.

Appeals may be taken from the circuit courts and superior courts to the Supreme Court by either party from all *final*

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judgments, except in certain actions originating before a justice of the peace. Also from certain interlocutory orders of any circuit court, or judge thereof, in the cases specified in the statutes. §§644, 658 Burns 1894.

An appeal may be taken from a judgment against any person in a proceeding for contempt, where a fine, or imprisonment, or both, are imposed. §§1023, 1025 Burns 1894.

The order made by the Shelby Circuit Court requiring the appellant to appear and testify, was an interlocutory, and not a final, order, and there is no provision in the statutes for an appeal from an order of this character. *Western Union Co. v. Locke*, 107 Ind. 9; *Jager v. Doherty*, 61 Ind. 528.

If the appellant had disobeyed the order by failing to attend, on July 5, 1899, or refusing to testify, as he was commanded to do, and if, upon proper proceedings under the statute, he had been found guilty of an indirect contempt of the court, and a judgment that he be punished therefor by fine, or imprisonment, or both, had been rendered against him, an appeal might have been taken from that judgment. §§1023, 1025 Burns 1894.

The order complained of was merely preliminary, and was but a step in the statutory proceeding to compel a contumacious witness to respect and obey the process of the court.

Appeal dismissed.

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[No. 18,742. Filed June 7, 1900.]

EXECUTION SALES.—Appraisement. — Judgment. — Construing §744 Burns 1894 with §585, a judgment without relief cannot rightfully be rendered unless the law provides for such a judgment in the particular case, and if the law does so provide, the judgment must be entered "without relief" or a sale thereunder without appraisement will be illegal. *pp. 34, 35.*

155	33
155	178
155	33
158	96
155	33
164	274
155	33
167	68

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PLEADING. — *Informal Demurrer.* — A cause will not be reversed because of the action of the court in sustaining an informal demurrer to a bad answer. *p. 36.*

From the Jay Circuit Court. *Affirmed.*

Emerson McGriff, W. H. Williamson and S. A. D. Whipple, for appellant.

D. T. Taylor, W. F. MacGinnitie and T. J. Taylor, for appellee.

BAKER, C. J.—Suit to vacate a sheriff's sale of real estate on execution. Appellee's complaint charges that prior to May 16, 1896, an action to recover damages for seduction, wherein Ola Brown was plaintiff and appellee was defendant, was pending in the Adams Circuit Court; that, the cause being set for trial, appellee procured a continuance; that thereupon Ola Brown moved for judgment for costs occasioned by the continuance, and the court rendered judgment against appellee as follows: "It is therefore considered and adjudged by the court that the plaintiff recover of and from the defendant the costs and charges taxed at the sum of \$111.49"; that on January 28, 1897, the clerk of the Adams Circuit Court issued to the sheriff of Jay county an execution on the judgment "without relief from appraisement laws"; that the sheriff levied the execution upon certain real estate belonging to appellee in Jay county, and, without causing the land to be appraised, sold it to appellant for \$47, which was a sum greatly below its value at the time; that appellant paid his bid and received from the sheriff a certificate of purchase. To this complaint, appellant unsuccessfully demurred, and thereupon answered, confessing the facts stated by appellee to be true, and attempting to avoid the effect thereof by alleging that the judgment was made up of various sums for services rendered by the clerks and sheriffs of Adams, Jay, and Wells counties, which were unpaid and owing to those counties, and that therefore the judgment was collectible without relief from appraisement laws though the judgment itself did not so

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provide. Upon a demurrer's being sustained to this answer and appellant's refusal to plead further, judgment was entered that the sheriff's sale be vacated. The errors assigned involve the sufficiency of the complaint and answer.

The command of §744 Burns 1894, §732 R. S. 1881 and Horner 1897, is that "No property shall be sold on any execution or order of sale issued out of any court for less than two-thirds of the appraised cash value thereof, exclusive of liens and encumbrances, except where otherwise provided by law". Section 585 Burns 1894, §576 R. S. 1881 and Horner 1897, requires that "When a judgment is to be executed without relief from appraisement laws, it shall be so ordered in the judgment". Construing these two sections together, it is found that a judgment "without relief" can not rightfully be rendered unless the law provides for such a judgment in the particular case, and that, if the law does so provide, the judgment must be entered "without relief" or a sale thereunder without appraisement will be illegal. *Doe v. Collins*, 1 Ind. 24; *Doe v. Craft*, 2 Ind. 359; *Harris v. Makepeace*, 13 Ind. 560; *Culph v. Phillips*, 17 Ind. 209; *Evans v. Ashby*, 22 Ind. 15; *Fletcher v. Holmes*, 25 Ind. 458; *Tyler v. Wilkerson*, 27 Ind. 450; *Howe v. Dibble*, 45 Ind. 120; *Stotsenburg v. Same*, 75 Ind. 538; *Cox v. Bird*, 88 Ind. 142; *Lytton v. Baird*, 141 Ind. 446. The demurrer to the complaint was properly overruled.

The costs for which judgment was rendered were and could legally be only those made by the plaintiff Ola Brown which she had paid or was liable to pay to the officers for the counties mentioned in the answer. *Armsworth v. Scotten*, 29 Ind. 495; *Hays v. Boyer*, 59 Ind. 341; *Goodwin v. Smith*, 68 Ind. 301; *Keifer v. Summers*, 137 Ind. 106; *Mott v. State*, 145 Ind. 353; *Wilson v. Jenkins*, 147 Ind. 533. That the officers are authorized to collect costs from the parties who made them, by fee-bill, without relief from appraisement laws, is immaterial. And it is needless to inquire whether the judgment for costs could have been

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legally rendered "without relief", since it was not "so ordered in the judgment". The answer was bad.

Appellant claims to be entitled to a reversal, even if the complaint is good and the answer bad, because appellee's demurrer to the answer challenged its sufficiency "to constitute a cause of action". Although it would not have been error if the court had overruled or stricken out the demurrer because it presented no question, the judgment will not be reversed on account of the sustaining of an informal demurrer to an answer that does not state facts sufficient to constitute a cause of defense. *Blue v. Capital Nat. Bank*, 145 Ind. 518; *Garrett v. Bissell, etc., Works*, 154 Ind. 319.

Judgment affirmed.

 BORDERS v. WILLIAMS.

[No. 19,103. Filed June 8, 1900.]

ELECTIONS.—Contests.—Pleading.—In an action to contest an election the complaint must set forth specifically the particular facts counted upon as invalidating the election. *p. 39.*

SAME.—Contests.—Pleading.—An allegation in a complaint in an action to contest an election that the contestor received more votes than the contestee is not the averment of any fact within the purview of the causes for contesting an election as enumerated in §6312 Burns 1894, but is tantamount to a general averment that the judgment of the county board of canvassers was erroneous, and when pleaded as an independent ground of contest will be regarded as surplusage. *p. 39.*

SAME.—Contests.—Where in an action to contest an election the issue joined was the failure of the board of canvassers to count all of the votes received by plaintiff in a certain precinct, it was error for the court to admit in evidence and count for plaintiff rejected ballots from another precinct. *pp. 39-41.*

SAME.—Contests.—Ballots.—Distinguishing Marks.—A cross placed in the square at the left of two candidates for county commissioner in the same district does not constitute a distinguishing mark within the meaning of §§6248c and 6248g Burns Supp., and such ballot being regular in other respects should be counted for the candidates for other offices for whom it was properly marked. *pp. 41-45.*

155	26
156	364
155	86
161	411

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From the Pulaski Circuit Court. *Reversed.*

George Burson, W. W. Borders and B. Borders, for appellant.

H. A. Steis, M. M. Hathaway and F. J. Vurpillat, for appellee.

HADLEY, J.—At the November election 1898, the county board of canvassers counted for appellant 1,383 votes, and issued to him a certificate of election as treasurer of Pulaski county. The board counted for appellee 1,377 votes for the same office. Appellee instituted this action under §6314 Burns 1894, §4758 Horner 1897, to contest appellant's election.

In the complaint and statement of his grounds of contest, appellee alleged that at said election there were counted for him 1,377, and for the contestee 1,383 votes, and the contestee was declared by the board of canvassers to be duly elected; that appellee contested said election on the following grounds: (1) That he had received a greater number of legal votes than had been received by the contestee. "(2) For malconduct of the board of canvassers of said election in this, to wit, that the contestor in precinct number one of Tippecanoe township of said county received ninety-three votes, and that the contestee, Borders, received seventy-two legal votes, but that in estimating and counting the votes of said precinct the said board of canvassers, by mistake, only counted eighty-three votes for the contestor and seventy-two votes for the contestee as the whole number of votes cast in said precinct for the said contestor and contestee. whereas, in truth, the contestor, Williams, received ninety-three votes in said precinct at said election, and that he, said Williams, is eligible to hold said office."

Appellant, Borders, as contestee, answered in two paragraphs: (1) A general denial, and (2) that, while the several precinct officers and county board of canvassers counted for him but 1,383 votes for the office of treasurer,

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he, in truth and in fact, received 1,460 legal votes for said office, and that he received sixty-seven legal votes that were not counted for him, setting forth a number in each of twelve precincts aggregating sixty-seven; that said board of canvassers wrongfully counted as cast for the contestor forty-seven votes from precinct number one of Beaver township, and divers other votes in various precincts set forth in detail. Contestor, Williams, replied to the second paragraph of answer by a general denial. The commissioners awarded the election to the contestor by one vote, whereupon the contestee appealed to the circuit court, where the election was awarded to the contestor by four votes, from which judgment the contestee takes this appeal.

Under the issues formed as above stated, the court permitted the contestor, over the objection of the contestee, to introduce in evidence, and have counted in his behalf, two ballots that had been protested and rejected, in precinct number three of Monroe township, the same being marked in the record exhibits twelve and sixteen; and this action of the court presents the first question for consideration. It is earnestly contended by appellee that this evidence was admissible under the first clause of his complaint, which, in substance, alleges that he, the contestor, had received at said election a greater number of legal votes than were received by the contestee. By §6312 Burns 1894, any election may be contested for any of the following causes: "*First*, For irregularity, or malconduct of any member or officer of the proper board of judges or canvassers. *Second*, When the contestee was ineligible. *Third*, When the contestee, previous to such election, shall have been convicted of an infamous crime, such conviction not having been reversed nor such person pardoned at the time of such election. *Fourth*, On account of illegal votes."

The causes here enumerated must be held to constitute the only causes for which the contest of an election can be maintained; and it is provided by §6314 Burns 1894, that

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“Whenever any elector shall choose to contest” any county or township office, “he shall file with the auditor of the proper county, within ten days after such person has been declared elected, a written statement *specifying the grounds of contest*.” that is to say, if irregularity or malconduct of election officers is relied upon, or if it is the contestee’s ineligibility, or his previous conviction of crime, or on account of his having received illegal votes, the complaint, within these enumerated causes, must specifically set forth the particular facts counted upon as invalidating the election of the contestee. The averment that the contestor received more votes than the contestee is the averment of no fact within the purview of the enumerated causes. It challenges neither irregularity, nor malconduct of officers, nor ineligibility of contestee, nor his conviction of crime, nor his receipt of illegal votes. It is but tantamount to a general averment that the judgment of the county board of canvassers, pronounced upon the returns from the precincts, that the contestee had received the highest number of votes, was erroneous, which would be a mere conclusion, and present no question of fact, and, when pleaded as in this case, as an independent ground of contest, we must regard it as insufficient and surplusage.

In his second ground appellee specifically sets forth the malconduct of the board of canvassers in counting for him but eighty-three of the ninety-three of the legal votes received by him in the first precinct of Tippecanoe township, and upon this single fact he rests his contest. No complaint is made of the failure of the board to count for him contested ballots twelve and sixteen from the third precinct of Monroe township. This complaint appellant answered (1) by a general denial, and (2) that, while the board of canvassers counted for him but 1,383 votes, he in truth and fact received 1,460 legal votes; that he had received sixty-seven legal votes that were not counted for him by the board of canvassers, alleging a number of uncounted ballots in each

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of twelve precincts aggregating sixty-seven. To this second paragraph of answer appellee replied by a general denial.

Here we have two issues joined,—one on the complaint as to the failure of the board to count for the contestor ten votes from the first precinct of Tippecanoe township, to which he claims to be entitled; the second on the second paragraph of the answer as to the failure of the board to count for the contestee sixty-seven votes to which he claims to be entitled from various precincts of the county; and upon these issues and the facts therein specifically set forth the case was made ready and submitted to the court for trial. And the court “shall be governed in such trial by the rules of law obtaining in the circuit courts.” §6317 Burns 1894, §4761 Horner 1897; *Hadley v. Gutridge*, 58 Ind. 302; *Tombaugh v. Grogg*, 146 Ind. 99, 107.

One of the rules obtaining in the circuit court is that the evidence must be confined to the facts in issue, and that the plaintiff must recover *secundum allegata et probata*, or not at all. It is said in *Boardman v. Griffin*, 52 Ind. 101 at page 106: “It would be folly to require the plaintiff to state his cause of action, and the defendant to disclose his ground of defense, if, on the trial, either or both might abandon such grounds and recover upon others which are substantially different from those alleged.” See, also, *Cleveland, etc., R. Co. v. Wynant*, 100 Ind. 160, 166; *Racer v. Wingate*, 138 Ind. 114, 131; *Neutz v. Jackson Hill, etc., Co.*, 139 Ind. 411, 414; *Stevens v. Reynolds*, 143 Ind. 467, 484; *Cincinnati, etc., R. Co. v. McLain*, 148 Ind. 188, 193; *Thompson v. Citizens Street R. Co.*, 152 Ind. 461, 465.

We perceive no ground for the contention that in contested election cases the procedure is more liberal than in the trial of other civil causes with respect to the issues and evidence. The statute requires the contestor specifically to state in his complaint the grounds of contest relied upon. That he shall therein state *all* the grounds he depends upon is emphasized in the provision that requires him to serve a

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copy of the specifications upon the contestee, manifestly that the contestee may have timely notice of the particular facts against which he is called upon to defend his title. We concede that under proper issues the controlling question in such cases is, which of the contestants has received the greater number of legal votes? But we are not prepared to grant that the statute and settled rules of practice may be so far disregarded as to hold that a single ground of contest properly pleaded is sufficient to open up to adjudication other substantially different grounds without plea. Such a rule would invite loose and imperfect pleading, and give no warning to a contestee before trial of the real grounds upon which his case was liable to be determined.

As the rejection and failure to count for the contestor ballots twelve and sixteen from Monroe township constituted no part of the complaint or reply, and hence not within the issues, we must conclude that the court erred in admitting them in evidence, and counting them for appellee. So far as language employed in *Hadley v. Gutridge*, 58 Ind. 302, at page 315, may be construed as holding a different doctrine, the same is disapproved.

Appellant further claims that the court erred in refusing to admit in evidence, over the objection of appellee, and to count in behalf of appellant, original ballots numbered eight, nine, ten and eleven, which had been cast at the election, and returned to the office of the county clerk as contested, and not counted, ballots. The point of objection to each of these ballots is that the voter made a cross in the square to the left of the names of two candidates for the same office, namely, on number eight a cross to the left of the names of two candidates for county commissioner for the first district, on number nine, two candidates for the office of county commissioner for the second district, on number ten two candidates for sheriff, and on number eleven two candidates for commissioner of the first district. Otherwise each ballot was properly marked as indicating a

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vote for a single candidate for each of the other offices voted for, and each indicating by a cross a vote for the appellant for the office of county treasurer.

By §3 of the act approved February 23, 1897 (Acts 1897 p. 49, §6248c Burns Supp.), it is provided that if the voter desires to vote for all the candidates of one party, he shall make a cross in the large circle containing the party emblem, and if he marks within the large circle he shall not mark elsewhere on the ballot unless there be no candidate for some office in the list printed under such party device, in which case he may indicate his choice by marking in the square to the left of the name of any candidate for such office on any other list; and, if the elector desires to vote a mixed ticket, he shall omit the mark from the circle inclosing the party device, and indicate his choice of candidates by making a cross in the square immediately preceding their names; and a mark upon the ballot in violation of these provisions shall be treated as a distinguishing mark. By section seven of the same act (§6248g Burns Supp.), it is, among other things, provided: "And any ballot or part of a ballot from which it is impossible to determine the elector's choice of candidates shall not be counted as to the candidate or candidates affected thereby."

These provisions of the statute must be construed together in determining when the character provided by law shall be regarded such a distinguishing mark as to invalidate the ballot. It is clear from the law itself that the legislature intended it should be so regarded only when its position upon the ballot makes doubtful the intention of the voter, or casts suspicion upon the integrity of the vote. The law provides that a mark in the circle inclosing the party emblem shall indicate the voter's intention to vote a straight ticket, and a mark in the squares below the emblem shall indicate his intention to vote a mixed ticket. So, if a mark appears in the large circle with the party emblem, indicating a straight vote, and also marks appear upon the small squares

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below, indicating a mixed ticket, the two positions being inconsistent, the judges of election will be unable to determine whether a straight or mixed ticket was intended by the voter, and the whole ballot must therefore be rejected for uncertainty. Likewise, when a cross or other mark is found anywhere upon the ballot, without the circle and squares, its position will indicate no lawful purpose whatever, and discredit the entire ballot, and in such cases the cross must be regarded as a distinguishing mark in the sense that it invalidates the ballot. It is purity of election and a free and honest expression of the voter's will that is aimed at, and a substantial compliance with the law in the execution of the ballot will suffice if the general appearance of the ballot is such as clearly to indicate an honest effort by the voter to comply with the law, and his choice of candidates may be clearly ascertained. *Bechtel v. Albin*, 134 Ind. 193, 200; *Zeis v. Passwater*, 142 Ind. 375.

It should be borne in mind, in passing upon the validity of a ballot, when the questionable mark is the prescribed cross, and the same touches or is within a circle or square, that many voters are unskilled in the use of the pencil, that some degree of nervousness frequently attends the preparation of the ballot, that the light in the booth is often poor, the vision of many impaired, and that in passing from one list of candidates to another in an imperfect light or vision it reasonably may, and doubtless does sometimes, happen that the voter by honest mistake places his mark upon a line or square different from the one intended; and when this is shown by the general appearance of the ballot, and the ballot is properly executed in all other respects, it should be counted for all the other candidates not affected by the mistake. This is the evident meaning of the statute last above quoted.

We are supported in this view from another consideration. After the passage of the election law of 1897, *supra*, the two great political parties, through their respective state

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central committees, by mutual agreement, each selected a committee of three lawyers, eminent for their legal learning, to construe several provisions of the law. These committees met in joint session, and, having concurred in an opinion upon the correct construction to be given to each of the several sections of the law submitted to them, reported said opinion to their several party state central committees, which was by each central committee and by the state board of election commissioners approved, and accepted as the correct exposition of the law. This report was published by authority of the state board of election commissioners with the laws governing elections, and distributed throughout the State for the guidance of voters and election officers in holding the election of 1898; and in construing section seven of the act of 1897 with respect to the marking of ballots said joint committee employ the language following: "In case there are two or more persons to be elected to the same office, as in the case of senators and representatives in the legislature, judges of the superior court, justices of the peace, etc., if the name of one or more, but less than all, of such persons for a particular office are marked on one or more of the tickets, the ballot must be counted for the persons whose names are so marked; but if, in such case, the names of more persons than are to be elected to the particular office are marked on any ballot, such ballot can not be counted for any person for that office, for the reason that it can not be determined which of the right number to be elected were intended to be voted for, *but the ballot is valid and must be counted for the candidates for other offices as to whom it is properly marked.*" Election Laws and Instructions to Voters, 1898, p. 5. "If any ballot be found mutilated, defaced or marked so that it can be identified, it must not be counted; but the board should not adhere to such a severe construction of the law as will deprive innocent or honest voters of their rights. In determining the intention of the voter a careful but common sense discretion should be exercised." *Supra* p. 14.

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In considering a similar report made upon the election law of 1889, this court said in *Parvin v. Wimberg*, 130 Ind. 561, at page 565, 15 L. R. A. 776: "It is fair to presume that the electors and election officers throughout the State accepted this as the true construction of the statute under consideration, and thereupon, in conducting the ensuing election, acted upon it. This construction having been accepted and acted upon by the officers whose duty it was to administer the law, the courts should not now ignore it, unless it is palpably wrong." See authorities there cited. And adopting as our own the further language of the court in that case: "The construction placed upon the statute by the committee to whom it was referred is not palpably wrong, but, on the contrary, we think the conclusion it reached is the correct one." We conclude, therefore, that ballots eight, nine, ten and eleven should have been admitted in evidence and counted for the appellant.

Under the special finding of facts by the court appellee, Williams, received a total of 1,389 votes, and appellant, Borders, received a total of 1,385 votes. As we have seen, the court erroneously admitted in evidence and counted for appellee ballots twelve and sixteen, which will reduce his legal votes to 1,387. The appellant is entitled to have added to 1,385, so found by the court, ballots eight, nine, ten, and eleven, erroneously excluded by the court, thus making appellant's total of legal votes, 1,389, which is the largest number of legal votes received by any candidate at the election for the office of county treasurer, and which duly elected him to said office.

There are other questions arising upon the exceptions to the conclusions of law and under the motion for a new trial, the decision of which would not change the result to which we have arrived, and which we will not, therefore, consider. Judgment reversed, with instructions to restate the conclusions of law, and render judgment for the appellant in accordance with this opinion.

Best v. State.

BEST v. THE STATE.

[No. 19,114. Filed June 8, 1900.]

CRIMINAL LAW.—Larceny.—Felonious Intent.—It is not necessary, to constitute the crime of larceny, that the taker should have intended to appropriate the property taken to his own use. *p. 46.*

SAME.—Larceny.—Felonious Intent.—An instruction in a prosecution for larceny that to entitle defendant to an acquittal the jury must be satisfied from the evidence that the felonious intent did not exist is erroneous. *p. 47.*

From the Marion Criminal Court. *Reversed.*

E. C. Ryan and *Frank P. Hendricks*, for appellant.

W. L. Taylor, Attorney-General, *Merrill Moores* and *C. C. Hadley*, for State.

MONKS, J.—There were three counts in the indictment against appellant. The first for unlawfully entering a dwelling-house in the daytime and attempting to commit larceny; the second for unlawfully breaking into and entering a dwelling-house in the daytime with intent to commit larceny; the third for petit larceny.

The jury returned a verdict finding him guilty of the crime of petit larceny charged in the third count of the indictment. The assignment of errors calls in question the action of the court in overruling appellant's motion for a new trial.

It is insisted that the court erred in refusing to give instruction six requested by appellant. Said instruction stated, as one of the essential elements of the crime of larceny, that the taking must be with the felonious intent existing at the time in the mind of the taker to appropriate the property taken to his own use. It is not necessary, to constitute the crime of larceny, that the taker should have intended to appropriate the property taken to his own use. *Gillett's Crim. Law* (2nd ed.), §§545, 546; 2 *Bishop's Crim. Law*, §§842, 843, 846, 847, 848; *Desty's Crim. Law*,

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§145j; Clark's Crim. Law, p. 282; 12 Am. & Eng. Ency. of Law, 778. The court did not err, therefore, in refusing to give said instruction.

It is urged that the court erred in giving instruction twelve. Said instruction proceeded upon the theory that to entitle the appellant to an acquittal the jury must be satisfied from the evidence that the felonious intent, which is an essential element of each crime charged in the indictment, did not exist. This theory is erroneous. The established rule is that if the jury had a reasonable doubt of the existence of the said felonious intent, the appellant was entitled to an acquittal. It is true that appellant was not found guilty of the offenses charged in the first and second counts of the indictment, but as the instruction was not limited to those counts, it can not be said that the same was harmless. Other objections are urged to said instruction, but it is not necessary to consider the same as said questions may not arise upon another trial.

Judgment reversed, with instructions to sustain appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

DRAKE ET AL. v. EVERSON.

[No. 19,120. Filed June 8, 1900.]

APPEAL AND ERROR.—*Record.—Evidence.—Time of Filing.—Act of 1899.*—Under the provision of the act of 1899 (Acts 1899, p. 884) that the transcript of the evidence shall be filed with the clerk within a time fixed by the court trying such cause, the court must act while the cause is before it, and when the time granted had expired, with nothing done, it was too late at the next term of court to fix a time within which the transcript of the evidence might be filed, as the cause was no longer *in fieri*.

From the Hancock Circuit Court. *Affirmed.*

David Smith, R. L. Mason and U. S. Jackson, for appellants.

E. Marsh and W. W. Cook, for appellee.

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BAKER, C. J.—The only error assigned and not waived is that the court erred in overruling the motion for a new trial. In support of the motion, the only contention made is that the evidence is insufficient. Appellee insists that the evidence is not in the record. The motion was overruled on April 13, 1899, the fifty-eighth day of the February term, and sixty days time was then given appellants in which to file their bill of exceptions. Nothing was done until September 25, 1899, the nineteenth day of the September term. On that day the following order-book entry was made: "Come the parties by their attorneys, and thereupon the official reporter of this court is ordered to file a transcript of the evidence in this cause by the 26th day of September, 1899." On the same day the reporter's transcript of the evidence was filed in the clerk's office. On September 27th appellants presented the transcript of the evidence to the judge and requested him to certify that it was correct and contained all the evidence; and the judge made such a certificate upon the transcript. Appellants claim that under the law of 1899 (Acts 1899 p. 384), the evidence is in the record of this appeal. It is unnecessary to examine the statute of 1899 in any other respect than to the time within which the transcript of the evidence must be filed in the clerk's office. The act provides that "The transcript of the evidence so prepared by such reporter shall be filed by him with the clerk of the court wherein such cause is tried, within a time to be fixed by the court trying such cause." Though the act does not say when the court shall make the order fixing the time, it is plain that the court must act while the cause is yet before it. On April 13, 1899, it was proper to give time, as was done. But after the time then granted had expired with nothing done, it was too late at the September term to fix a new time within which the transcript of the evidence might be filed, as the cause was no longer *in fieri*. *Utterback v. State*, 153 Ind. 545.

Judgment affirmed.

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[No. 18,771. Filed March 28, 1900. Rehearing denied June 8, 1900.]

MALICIOUS PROSECUTION.—Evidence.—Sufficiency.—In the trial of an action for malicious prosecution it was shown that plaintiff sold defendant a note purporting to have been executed by plaintiff's brother-in-law, a non-resident of the State; that plaintiff and defendant had resided in the same city for a number of years and plaintiff's reputation for honesty and integrity was good, but the alleged maker of the note was unknown to defendant. When the note matured defendant wrote the maker requesting payment, and was informed by letter that the note was a forgery, whereupon he sent an officer for plaintiff, who gave a minute detail of the transaction out of which the note was given, and offered to give defendant security in double the amount of the note until the validity thereof could be verified; but that defendant in disregard of plaintiff's statement and offer, and without advising with the prosecuting attorney, who was present, and against the advice of the chief of police, filed an affidavit against plaintiff charging him with uttering a forged note, upon which a warrant was issued and he was taken into custody. An indictment was subsequently returned against plaintiff, charging him with the offense, but a *nolle prosequi* was entered for the reason that the maker of the note had appeared before the grand jury and testified that the note was genuine. *Held*, that the evidence was sufficient to support a judgment for plaintiff. *pp. 50-53.*

SAME.—Probable Cause.—Instruction.—Where defendant caused plaintiff to be prosecuted for uttering a forged note upon receipt of a letter from the alleged maker denying the execution of the note, an instruction in an action against defendant for malicious prosecution to the effect that if defendant believed the statement contained in the letter to be true, and had no knowledge or information of any fact which would cause a man of reasonable intelligence or caution to doubt or disbelieve the statement, then there was probable cause for the prosecution, and the verdict should be for defendant, was properly refused. *pp. 53-57.*

INSTRUCTIONS.—Hypothetical Statement.—The rule that a hypothetical instruction must contain a statement of all of the material facts which the evidence reasonably tends to prove applies only to the substantive and controlling facts, and not to the subsidiary and evidentiary facts. *pp. 57, 58.*

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MALICIOUS PROSECUTION.—*Probable Cause.*—*Instructions.*—Probable cause does not depend upon the guilt or innocence of the plaintiff, but upon appearances deduced from facts known to the defendant, and information received by him, and properly investigated, of a character to produce in the mind of a reasonably prudent and cautious person the honest belief that the crime charged had been committed, and an instruction in an action for malicious prosecution to the effect that if the evidence preponderates in favor of the defendant, and establishes the crime charged, the defendant then had the right to institute the criminal proceeding against plaintiff, was erroneous, as the jury might reasonably infer therefrom that the only defense, so far as probable cause was concerned, was proof that the plaintiff was actually guilty of the crime for which he was prosecuted. *pp. 59, 60.*

From the Gibson Circuit Court. *Reversed.*

A. Gilchrist, C. A. De Bruler, C. A. Buskirk and J. W. Brady, for appellant.

G. V. Menzies, J. W. Spencer and J. R. Brill, for appellee.

HADLEY, C. J.—Appellee sued the appellant for malicious prosecution. Verdict and judgment for appellee for \$5,000. The overruling of appellant's motion for a new trial is the only error assigned.

The first reason set out in the motion, and the one most earnestly urged upon the consideration of this court, is that the verdict of the jury is not sustained by sufficient evidence.

The material facts which the evidence tends to establish follow: At the time of his arrest, the appellee, Wenzel, had resided in the city of Evansville for four years, about two miles distant from appellant, Hutchinson, and had lived near by in the county for about thirty years. Wenzel bore a good reputation for honesty and integrity among his neighbors in Evansville, and also in the county where he had previously lived. In the early part of June, 1895, Hutchinson sold Wenzel a policy of life insurance, and, as collateral security for the payment of the premium, took from Wenzel a note dated Ridgeway, Illinois, April 25, 1895, calling for

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\$125, and purporting to have been executed by one Mathias Bahl for value, payable to the order of Wenzel on the 25th day of December, 1896. At the time of the assignment Hutchinson promised that he would investigate the financial responsibility of Bahl, who resided at Ridgeway, sixty-four miles from Evansville. Wenzel informed Hutchinson, when the note was assigned, that Bahl was his brother-in-law. July 8, 1895, Hutchinson, having learned through a commercial agency that Bahl was a responsible man, bought the note, which he held as collateral security, giving Wenzel therefor the face value in cash, less the amount of insurance premium and a small sum of borrowed money. One Kettle was a solicitor of insurance for Hutchinson, and, with the latter's knowledge and advice, Kettle procured Wenzel to introduce him among his (Wenzel's) friends, and any commission thus earned in the sale of insurance was to be shared between them. A few weeks after the sale of the note to Hutchinson, Kettle and Wenzel took to Hutchinson's office an application for insurance purporting to have been executed by one Wintenheimer. Kettle requested that the commission due on the application be advanced. The request was refused, and subsequently Wintenheimer denied signing the application, which was destroyed, and no further step taken upon it. Its execution was affirmed by Kettle and Wenzel, and denied by Wintenheimer. Wenzel could not write nor read writing, and with much difficulty wrote his name. Sixteen months later Hutchinson wrote and mailed a letter to Bahl, as follows: "Evansville, Ind., November 30, 1896. Mr. Mathias Bahl, Ridgeway, Ill. Dear Sir: Your note of \$125, April 25, 1895, bearing six per cent. interest from date, given John M. Wenzel, is payable to me. Please advise where I shall send same for collection. Or, if you prefer, remit amount of note, with six per cent. interest from date, to me, and I will forward note to you canceled. Yours very truly, Alexander Hutchinson." In due course of mail, eleven days later, appellant

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received a letter purporting to come from Bahl, of date and words following: "George W. Pillow, Ridgeway, Ill. John J. Parish, Harrisburg, Ill. Lawyers. Pillow & Parish. Ridgeway, Ill., December 11, 1896. Mr. Alexander Hutchinson, Evansville, Ind. Dear Sir: Yours of November 30th at hand. Contents noted. In reply will say I never executed any note for any amount to John M. Wenzel at any time. If you have such a note it is a forgery pure and simple. Very truly, Mat. Bahl." Appellant received the Bahl letter on the evening of the day following its date, and immediately called up police headquarters by telephone, and requested the services of an officer. He shortly after drove to police headquarters, and had an interview with the chief, which resulted in the chief sending an officer, without a warrant, to bring Wenzel in. When Wenzel arrived, he most earnestly asserted to appellant, in the presence of chief of police Covey, the genuineness of the note, and that Bahl would not deny its execution if confronted with it, and gave a minute detail of the transaction out of which the note grew, and the names of four persons, all residents of Ridgeway, who were present, and knew all about the transaction, among them a justice of the peace, who, with other papers, wrote the note; and at the same time exhibiting to appellant two other notes executed in the same transaction to him by Bahl, and written by the same justice. Wenzel also at the same time offered to give appellant security in double the amount of the note, to stand until the integrity of the note could be investigated. Appellant, without any knowledge of Bahl except such as he had learned through a commercial agency concerning his solvency, without any effort to communicate with Bahl further, or with any of the persons alleged to have been present when the note was executed, and without effort to learn Wenzel's standing among his neighbors, and without any step to verify Wenzel's guilt further than to compare the signature to the note with that to the letter addressed to him under date of De-

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cember 11th, and disregarding the statement of the chief of police, who told him he thought Wenzel "talked all right", and neglecting to advise with the prosecuting attorney, who was present, of his own motion executed an affidavit prepared for him by the city clerk, charging Wenzel with uttering a forged note, upon which affidavit a warrant was issued, and Wenzel taken into custody.

On December 22nd an indictment was returned by the grand jury, charging Wenzel with the offense, and, subsequent to the return of the indictment, the prosecuting attorney moved that a *nolle prosequi* be entered, stating in his motion as a reason therefor that Mathias Bahl had appeared before the grand jury, and testified under oath that the alleged forged note was his genuine note, executed by him to Wenzel for a valuable consideration. The motion was sustained, and appellee discharged. Upon the trial the defendant, Hutchinson, offered no evidence tending to prove Wenzel's guilt.

As we have reached the conclusion that this appeal must be sustained, it must suffice for us to say, in respect of the first point presented, that, after a careful examination of the evidence, we fail to perceive sufficient ground for disturbing the judgment for want of evidence to support the verdict.

It is next urged that the court erred in refusing to give to the jury appellant's request number four. In this instruction the court was requested to charge the jury, in substance, that if they found from the evidence that Wenzel sold to the defendant the note in question, which purported to have been made by Mathias Bahl; that on the 30th day of November, 1896, the defendant wrote to Bahl the letter above set out; that in answer to that letter the defendant received from Bahl the letter of December 11th, above set out; that if the jury "further find that the defendant had at said time no knowledge or information of any fact which would cause a man of reasonable intelligence and caution to doubt or disbelieve the statement in said letter that said

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note was a forgery, and that the defendant did believe such statement", then there was probable cause for the prosecution, and the verdict should be for the defendant.

There are certain settled principles of the law that must be applied in determining the accuracy of the instruction objected to: (1) In actions for malicious prosecution "where the facts are not disputed the court must decide, as matter of law, whether they do or do not constitute probable cause; but where they are disputed, then the court must hypothetically state the material facts which there is evidence fairly tending to prove, and positively direct as to the law upon the assumed state of facts." *Pennsylvania Co. v. Weddle*, 100 Ind. 138, 147; *Cottrell v. Cottrell*, 126 Ind. 181. (2) "Probable cause" is "that apparent state of facts found to exist upon reasonable inquiry; that is, such inquiry as the given case renders convenient and proper, which would induce a reasonably intelligent and prudent man to believe the accused person had committed, in a criminal case, the crime charged." *Lacy v. Mitchell*, 23 Ind. 67; *Hays v. Blizzard*, 30 Ind. 457; *Richter v. Koster*, 45 Ind. 440; *Graeter v. Williams*, 55 Ind. 461; *Pennsylvania Co. v. Weddle*, *supra*.

The position assumed by the appellant seems to be that, if the Bahl letter was of a character to create in the mind of a person of reasonable intelligence and caution the belief that Wenzel was guilty, and did in fact create such belief in the mind of the defendant, that fact alone constituted probable cause. We can not approve this doctrine. A belief, however honest, if suddenly acquired upon information not known to be true, will not justify a prosecution if formed upon inadequate inquiry under circumstances which afford reasonable and convenient opportunity to verify such belief, and which prudent men would investigate before acting. The belief of an accuser counts for nothing when carelessly or recklessly formed upon a single item of information, if it be shown that he failed to inquire into other

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reasonable and convenient sources pointed out to him that would have established the innocence of the accused. There must be real, honest belief, and reasonable grounds upon all the appearances after such investigation as a prudent person would make, under the circumstances of the case, to afford a justification. *Lacy v. Mitchell*, 23 Ind. 67; *Bitting v. Ten Eyck*, 82 Ind. 421, 42 Am. Rep. 505; *Flora v. Russell*, 138 Ind. 153, 160; *Fisher v. Hamilton*, 49 Ind. 341, 347; *Graeter v. Williams*, 55 Ind. 461; *Walker v. Camp*, 63 Iowa 627; *Grinnell v. Stewart*, 12 Abb. Pr. 220; *Tabert v. Cooley*, 46 Minn. 366, 49 N. W. 124, 13 L. R. A. 463; *Merriam v. Mitchell*, 13 Me. 439; *Travis v. Smith*, 1 Pa. St. 234.

Appellant had no knowledge of Bahl except as to his solvency. His age, his memory, his veracity, his possible craftiness, his handwriting, were unknown to him. He lived outside the jurisdiction of the court. In acting upon the letter, he was required to trust the memory, the veracity, the accuracy, and good faith of a total stranger whom he had never seen. The letter imported no greater verity than the note. It was on the letter-head of lawyers who might have written in unauthorized language, and in a spirit of reckless intimidation. It was signed "Mat Bahl"; the note, "Mathias Bahl." How could the defendant tell which was the true signature, and whether either or both?

In the sixteen months appellant had owned the note, Wenzel had resided in the city, had visited appellant's office, and nothing had occurred in his conduct to arouse the slightest suspicion that the note was a forgery. The fact is that when the affidavit was filed the appellant was not in possession of an item of legal evidence that the note was a forgery; nor had he any reasonable ground to believe that he could produce any such evidence. Bahl was a non-resident, and had not promised to attend the trial.

Information that will constitute probable cause must relate to such facts as strongly tend to establish the crime charged accompanied with reasonable ground for the ac-

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cuser to believe that he will be able to produce competent and sufficient evidence thereof upon the trial. The information must be, as said in *Barron v. Mason*, 31 Vt. 189, "of such directness and certainty, as to gain credit with prudent men, of the existence and susceptibility of proof of such facts as show guilt; or which the defendant, upon proper advice, supposed would constitute guilt. This is the result of the decided cases and of common experience upon the subject."

On the other hand, as against the Bahl letter, when appellant confronted Wenzel at police headquarters, and before the affidavit was filed, the latter most earnestly protested his innocence, and repeatedly asserted that Bahl would not deny the note if particularly called to his attention, and gave a minute and circumstantial account of the transaction out of which the note grew, and the names of four persons, all then residents of Ridgeway, who were present, and knew all about it, and among them a justice of the peace, who, with other papers, wrote the note in controversy; and in that connection drew from his pocket and exhibited to the appellant two other notes signed by Bahl, which he asserted were executed to him by Bahl in the same transaction, and which appeared in the same justice's handwriting; and offered to give appellant security in double the amount of the note, to stand until the matter could be investigated. Wenzel had lived thirty years in the county and four in the city, and bore a good character for honesty. It must be inferred that appellant knew of this character, or at least believed in it, or he would not, sixteen months before, have advised Kettle to engage Wenzel to introduce the former among the latter's friends and acquaintances for the purpose of soliciting insurance for appellant to write. Without good character, introduction would have been unprofitable. Under these circumstances, we can not say, as a matter of law, that an ordinarily prudent and cautious man, free from malice and passion, and actuated only by an

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honest purpose, would not have availed himself of the modern methods of easy and speedy communication to investigate the circumstantial account of the note. This reasonable precaution would have avoided all injury, for the sequel shows that a subsequent letter from appellant to Bahl speedily brought his money, and the complete vindication of Wenzel. The facts assumed in instruction number four, in view of the other evidence, did not constitute probable cause, and it was therefore properly refused.

Complaint is also made of the action of the court in giving instructions C and D, given by the court of its own motion. The court charged the jury, in substance, by "C," that if it had been proved by a preponderance of the evidence that, prior to the date of either of the letters above set out, Wenzel had sold and assigned to the defendant, Hutchinson, the note mentioned in the letters, and that shortly before the note became due defendant wrote and mailed to the maker of the note the above letter, dated November 30, 1896, and in due course of mail received the letter addressed to him under date of December 11, 1896; that upon the receipt of the letter by the defendant he at once procured a policeman to arrest Wenzel, and take him to police headquarters; that while at headquarters, and before the defendant had made and filed with the clerk of the police court the affidavit set out in the evidence, the defendant held a conference with Wenzel, in the presence of the chief of police, in which Wenzel denied his guilt as charged, and asserted that the note was the genuine note of Bahl, the apparent maker, and then and there gave the names and residence of real persons who knew of the manner of the execution of said note; that Wenzel was a person who bore a good reputation for honesty in the neighborhood where he lived, and was well known, which was known to the defendant at the time he made the affidavit, or which could have been easily and without inconvenience ascertained by him; that the defendant at the time had no knowl-

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edge or information as to the character of Bahl for truthfulness or honesty; and if they further found, by preponderance of the evidence, that the note in controversy was the genuine note of Mathias Bahl,—then, in view of the facts suggested, the defendant did not have probable cause to institute said prosecution at the time of making the affidavit. “D On the other hand, if the evidence preponderates in favor of the defendant, and establishes the forgery of the note in controversy, and the defendant wrote and mailed to Bahl the letter quoted in the last instruction, and received from Bahl the letter already quoted, then, on receipt of said letter, the defendant, Hutchinson, had the right to make and file the affidavit before mentioned, and had a right to institute the criminal proceedings complained of.”

It is insisted that instruction C is bad for omission from the hypothesis of the material facts: (1) that before receiving the letter from Bahl, appellant had learned through a commercial agency that Bahl was a man of means; (2) that Bahl was Wenzel's brother-in-law; (3) that before making the affidavit, appellant compared the signature to the Bahl letter with the signature to the note in controversy; and (4) the claim made by Wintenheimer that he did not execute the application for insurance asserted by Kettle and Wenzel. We concede the rule to be that all the *material* facts which the evidence reasonably tends to prove shall be stated in the hypothesis in such a case. The rule, however, must be taken in its reasonable sense to apply only to the substantive and controlling facts—facts essential to the validity of the hypothesis, and not the subsidiary and evidentiary facts. *Pennsylvania Co. v. Weddle*, 100 Ind. 138, 144. Otherwise, it would be difficult to tell where the trial judge should stop short of a recapitulation of the evidence and reasonable inferences, which can not be contemplated by the rule.

We can not see how the absent facts above suggested

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were material to the defense in the sense defined. And that the appellant did not so regard them upon the trial is apparent from the omission of all but the last one from any body of facts submitted to the court for the jury, as the defendant's hypothetical case.

With respect to the fourth omission, it related to the controversy between Wintenheimer and a discredited witness on the one side, and Kettle and Wenzel on the other. It was only a dispute, a question of veracity of the parties, that was never in any way confessed or determined; and it may well be doubted if it were competent evidence as tending in any degree to impeach the honesty of Wenzel. Instruction C was properly given to the jury.

A more serious question arises upon instruction D. By it the jury were, in effect, charged that if the evidence preponderates in favor of the defendant, and establishes the forgery of the note in controversy, the defendant then had the right to institute the criminal proceedings against the plaintiff. From the words here employed, the jury had the right to believe that the defense stated in the instruction excluded all others, and that the defendant was required to establish the forgery of the note by a preponderance of the evidence, or fail in his defense. In other words, the jury might reasonably infer from the instruction that the only defense open to the defendant, at least so far as probable cause was concerned, was proof that the plaintiff was actually guilty of the crime for which he was prosecuted. There are two fatal vices in this instruction: (1) The burden rested upon the plaintiff, and not upon the defendant, to establish want of probable cause. *Workman v. Shelly*, 79 Ind. 442, 445; *Swindell v. Houck*, 2 Ind. App. 519, 523. (2) Probable cause did not depend upon the guilt or innocence of the plaintiff, but upon appearances deduced from facts known to the defendant, and information received by him, and properly investigated, of a character to produce in the mind of a reasonably prudent and

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cautious person the honest belief that the crime charged had been committed. *Hays v. Blizzard*, 30 Ind. 457, 459; *Lytton v. Baird*, 95 Ind. 349, 352, and cases cited. We can not say that this instruction did not mislead the jury.

For error of the court in giving to the jury instruction D, the judgment must be reversed. Judgement reversed, with instructions to sustain the motion for a new trial.

DOTY ET AL. v. PATTERSON ET AL.

[No. 19,067. Filed March 7, 1900. Rehearing denied June 8, 1900.]

APPEAL AND ERROR.—Joint Assignment of Error.—A joint assignment of error to the conclusions of law presents no question for review, where each appellant separately excepted to each conclusion of law. p. 61.

CORPORATIONS.—Corporate Existence.—DeFacto Corporation.—Collateral Attack.—When there is a statute authorizing the creation of a corporation, an attempt to comply with the statute, and an actual exercise of corporate functions, although some formalities required by law have been omitted, there is at least a corporation *de facto*, the legal existence of which can only be questioned in a direct proceeding brought by the proper person for that purpose. pp. 62-64.

SAME.—Corporate Existence.—DeFacto Corporations.—Collateral Attack.—The rule that the corporate existence of a *de facto* corporation cannot be attacked collaterally is not limited to cases where one by contract admits corporate existence, but is a rule of general application. p. 64.

SAME.—DeFacto Corporations.—Enforcement of Contracts.—The contracts of *de facto* corporations may be enforced by and against them the same as if they were corporations *de jure*. p. 65.

SAME.—Stockholders.—Liability of Stockholder as Partner.—Stockholders in a *de facto* corporation cannot be held liable as partners, although there have been irregularities, omissions, and mistakes in incorporating the company. pp. 65, 66.

From the Hancock Circuit Court. *Reversed.*

S. A. Wray, R. L. Mason, U. S. Jackson and R. A. Black,
for appellants.

E. Marsh and W. W. Cook, for appellees.

155	60
156	509
155	60
159	664
155	60
160	588
155	60
161	589
155	60
165	216
155	60
170	397

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MONKS, J.—This action was brought by appellees against appellants for the dissolution of an alleged partnership, an accounting, and the appointment of a receiver to take charge of and sell the property thereof, and to recover any deficiency necessary to pay its debts. Appellants' demurrer for want of facts to the complaint was overruled. The cause was put at issue, and a special finding of facts made by the court, and conclusions of law stated thereon in favor of appellees. Appellants separately and severally excepted to each conclusion of law. Judgment was rendered in favor of appellees. The errors assigned by appellants are: (1) The court erred in overruling the demurrer to the complaint; (2) the court erred in its conclusions of law on the facts.

It is insisted by appellees that no question is presented by the last error assigned, for the reason that the same is joint as to all the appellants, while each appellant separately excepted to each conclusion of law. It is settled that under such conditions the joint assignment of error presents no question for our decision. *Green v. Heaston, Rec.*, 154 Ind. 127; *Grimes v. Grimes*, 141 Ind. 480, 481; *Louisville, etc., R. Co. v. Smoot*, 135 Ind. 220; *Sparklin v. Wardens, etc.*, 119 Ind. 535; *Ewbank's Manual* §138.

It is next insisted by appellees that "the error, if any, in overruling the demurrer to the complaint is harmless, for the reason that there is a special finding of the facts". It is true that where there is a special finding, the facts found may show that the action of the court in overruling a demurrer to a pleading was harmless.

The complaint, which is in one paragraph, proceeds upon the theory that the stockholders in a *de facto* corporation are liable to the creditors thereof as partners; and the special finding is made and conclusions of law are stated thereon in favor of appellees upon the same theory. It is evident, therefore, that, if such theory is erroneous, the conclusions

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of law and final judgment in favor of appellees are erroneous; and the record does not show that the error, if any, in overruling the demurrer to the complaint was harmless, or that the case was fairly determined.

It is alleged in the complaint "that on March 31, 1891, appellees and a part of appellants and the ancestors or assignors of the other appellants signed articles of association, whereby they undertook to form a corporation for the manufacture of butter and cheese, under the manufacturing and mining laws of this State, to be known and designated as the 'Fortville Butter and Cheese Factory'. The articles of association provided that the capital stock of said association should be \$6,000, divided into shares of \$50 each, and that upon the subscription of the sum of \$4,700 of said capital stock said articles should be filed in the office of the recorder of Hancock county in said State, and the remaining \$1,300 of said capital stock might be taken *pro rata* by said subscribers in proportion to the number of shares of stock subscribed by each, provided said election is made within such time as may be provided by the board of directors, and, upon failure so to elect, other persons might subscribe said stock; that thereupon said appellants, subscribers and signers of said articles of association, attempted to perfect said corporation, and elected a board of directors, as provided therein, and proceeded to contract indebtedness, and to purchase real estate, and to erect, construct, build, and operate a butter and cheese factory in the town of Fortville in said county, and purchased and caused to be conveyed to said subscribers, in the name of the "Fortville Butter and Cheese Factory," certain real estate in Hancock county, which is described in the complaint; that, with the money paid by the subscribers of said capital stock, they paid for said real estate, and erected a factory or creamery thereon at the cost of \$6,000; that in the legitimate and necessary operation of said factory it became and was neces-

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sary to contract a *bona fide* indebtedness largely in excess of the subscription to the capital stock, to wit, \$1,500, which said indebtedness the appellees were compelled to and did pay and fully satisfy; that the same has never been repaid to them, and is now due and wholly unpaid, and that the appellants have never paid, or in any manner contributed, their *pro rata* share, or part thereof, to reimburse appellees, although often requested so to do; that appellants and appellees failed to perfect a corporation, in this,—that said writings, which purported to be articles of incorporation, were not acknowledged or sworn to before an officer authorized to take acknowledgments of deeds; that the same were not signed in duplicate, and one thereof filed in the office of the Secretary of the State of Indiana; that the only thing that appellees and appellants did was to sign the instrument in writing purporting to be articles of incorporation, and file said instrument in the office of the recorder of Hancock county, where the same was recorded in the miscellaneous record; that, by reason of the facts aforesaid, the said appellees and appellants, the parties to said instrument, became and were partners in the business aforesaid, doing business under the firm name and style of the "Fortville Butter and Cheese Factory;" that the assets of said partnership will not pay the debts thereof, and that by reason thereof said partnership is insolvent; that the real estate and the factory have been suffered to become out of repair and unproductive, and have depreciated in value so as not to be worth more than \$500; that it cannot be insured, and, if a fire occurred, the factory would become a total loss; that, because of financial embarrassment, the factory cannot be operated, and will continue to remain idle, and become a total loss to the owners thereof. Prayer that a receiver be appointed to take charge of the property, collect the debts, and preserve or dispose of the property; that the partnership be dissolved; that an accounting be had, and appellants

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required to contribute to the payment of the money paid by appellees.

It is settled in this State that, when there is a statute authorizing the creation of a corporation, an attempt to comply with the statute, and an actual exercise of corporate functions, although some formalities required by law have been omitted, there is at least a corporation *de facto*, the legal existence of which can only be questioned in a direct proceeding brought by the proper party for that purpose. *Crowder v. Town of Sullivan*, 128 Ind. 486, 13 L. R. A. 647; *Williams v. Citizens, etc., R. Co.*, 130 Ind. 71, 74, 75, 15 L. R. A. 64; *Hasselman v. United States, etc., Co.*, 97 Ind. 365, 368, 369; *Williamson v. Kokomo, etc., Assn.*, 89 Ind. 389, and cases cited; *Baker v. Neff*, 73 Ind. 68. See, also, 1 Cook on Corp. (4th ed.) §234; 2 Cook on Corp. (4th ed.) §637; 1 Thompson on Corp. §§501, 505, 507; 2 Thompson on Corp. §§1851-1855, 1861; Clark on Corp. pp. 90-108; 8 Am. & Eng. Ency. of Law (2nd ed.) 754, 755, 756.

While, under the facts alleged in the complaint, the "Fortville Butter & Cheese Factory" was not a corporation *de jure*, they do not show that it was not a corporation *de facto*, but, on the contrary, it appears that an attempt was made to create a corporation under and in compliance with a law authorizing the creation of a corporation of its class and powers, and an actual exercise of corporate functions. Under the settled law of this State, therefore, the "Fortville Butter & Cheese Factory" was a *de facto* corporation, and its corporate existence cannot be questioned by appellees in this proceeding. This rule is not limited to cases where one by contract admits corporate existence, but is a rule of general application. *Williamson v. Kokomo, etc., Assn.*, 89 Ind. 389, 391; *North v. State*, 107 Ind. 356; *Palmer v. Logansport, etc., Co.*, 108 Ind. 137, 143; *Carmel, etc., Co. v. Small*, 150 Ind. 427, 430; 2 Cook on Corp. (4th

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ed.) §637; Clark on Corp. pp. 96-98. The contracts of *de facto* corporations may be enforced by and against them the same as if they were corporations *de jure*. This is because the *de jure* existence of a *de facto* corporation cannot be questioned in an action on such contracts either by the *de facto* corporation or the other party to the contract. 2 Cook on Corp. §637; 1 Thompson on Corp. §§518, 520, 521, 522, 528, 532; *Hasselman v. United States, etc., Co.*, 97 Ind. 365, 368; *Mullen v. Driving Park*, 64 Ind. 202, 206; *Ensey v. Cleveland, etc., R. Co.*, 10 Ind. 178; *Stoops v. Greensburg, etc., Co.*, 10 Ind. 47; *Ft. Wayne, etc., Co. v. Deam*, 10 Ind. 563.

The case of *Indianapolis, etc., Co. v. Herkimer*, 46 Ind. 142, and the class to which it belongs, are not in conflict with this doctrine. In those cases it was held that a subscriber to preliminary articles of association may, in a suit for the subscription, deny the existence of the corporation, and, to entitle the corporation to recover, it must prove that all the statutory requirements necessary to organize a corporation have been complied with. It was so held, for the reason that the contract of subscription showed upon its face that it was not made with an existing corporation, and that under said contract it was a condition precedent to a recovery thereon that there should be a *de jure* corporation afterwards created. *Williamson v. Kokomo, etc., Assn.*, 89 Ind. 389, 391, 392; 1 Morawetz on Corp. §67.

It follows, therefore, that as appellees cannot question the *de jure* existence of said corporation; although only a corporation *de facto*, the stockholders in such corporation cannot be held liable as partners in this proceeding. The rule established by the great weight of authority is that the stockholders in a *de facto* corporation cannot be held liable as partners, although there have been irregularities, omissions, and mistakes in incorporating the company. Clark on Corp. pp. 99-110; 1 Cook on Corp. (4th ed.) §234, and

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cases cited in notes; 2 Am. & Eng. Ency. of Law (2nd ed.) 1047; 23 Am. & Eng. Ency. of Law (1st ed.) 876, 877; *Snyder's Sons' Co. v. Troy*, 91 Ala. 224, 8 South. 658; 24 Am. St. 887; *Granby, etc., Co. v. Richards*, 95 Mo. 106, 8 S. W. 246; *Mokelumne Hill, etc., Co. v. Woodbury*, 14 Cal. 424; *Blanchard v. Kaul*, 44 Cal. 440; *Planters, etc., Bank v. Padgett*, 69 Ga. 159; *American, etc., Co. v. Bulkley*, 107 Mich. 447, 65 N. W. 291; *Merchants, etc., Bank v. Stone*, 38 Mich. 779; *Fay v. Noble*, 61 Mass. 188; *Trowbridge v. Scudder*, 65 Mass. 83; *First Nat. Bank v. Almy*, 117 Mass. 476; *Second Nat. Bank v. Hall*, 35 Ohio St. 158; *Humphreys v. Mooney*, 5 Col. 282; *Gartside Coal Co. v. Maxwell*, 22 Fed. 197; *Larned v. Beal*, 65 N. H. 184, 23 Atl. 149; *Reinhard v. Virginia, etc., Co.*, 107 Mo. 616, 18 S. W. 17; *Clark v. Richardson* (Ky.), 31 S. W. 878; *Vanneman v. Young*, 52 N. J. L. 403, 20 Atl. 53; *Stout v. Zulick*, 48 N. J. L. 599, 7 Atl. 362; *Bushnell v. Consolidated, etc., Co.*, 138 Ill. 67, 27 N. E. 596; *Johnson v. Okerstrom*, 70 Minn. 303, 73 N. W. 147; *Finnegan v. Noerenberg*, 52 Minn. 239, 53 N. W. 1150.

It is insisted by appellants that the contrary doctrine was declared by this court in *Coleman v. Coleman*, 78 Ind. 344. In that case it was sought to recover against the directors of a corporation which had not fully complied with all the requirements of the law in its organization, upon the ground that the corporation had no existence, and that, therefore, the directors had no principal, and were liable for the debts they contracted. The court below held the directors were not liable for such debts. It was insisted by the appellees, on appeal, that appellant and those under whom he claimed were estopped to deny the existence of said corporation, because they had either contracted with the corporation as such, or were members and promoters thereof. This court did not hold that said corporation was not a *de facto* corporation, nor that said appellant and those under whom

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he claimed were not estopped from denying its existence, but did not pass upon those questions for the reason that, conceding that there was no corporate body for which appellees were authorized to act, and that appellant and those under whom he claimed were not estopped from denying the existence of said corporation, still he was not entitled to recover against the directors, because, under such circumstances, the company was a partnership composed of all the subscribers to the articles of association who had not withdrawn, which included appellees as well as the original plaintiff in the action, for which partnership the appellees were the agents. The judgment of the court below in favor of the directors who were the appellees in this court was affirmed. That case furnishes no support for appellees' contention in this case.

Judgment reversed, with instructions to sustain the demurrer to the complaint and for further proceedings not inconsistent with this opinion.

THE STATE, EX REL. LITTLE, v. PARSONS ET AL.

[No. 18,758. Filed June 19, 1900.]

GUARDIAN AND WARD.—*Failure of Guardian to Account.*—*Action on Bond.*—*Limitations.*—An action by a ward to recover on his guardian's bond for failure of guardian to account for moneys received, such failure being due to fraud or mistake, is barred after three years from final settlement.

From the Hamilton Circuit Court. *Affirmed.*

S. D. Stuart, C. G. Reagan and J. W. Haughey, for appellant.

F. E. Gavin, T. P. Davis and J. L. Gavin, for appellees.

BAKER, C. J.—In 1884 relatrix began this action against Nagle, administrator of Beeson, against Harbaugh and Burris, sureties on Beeson's bonds given in 1873 and 1874 as guardian of relatrix, and against Parsons,—to recover judg-

155	67
156	528
155	67
165	417
d165	419

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ment on the bonds against Beeson's estate and Harbaugh and Burris on account of Beeson's alleged conversion, in 1877, of \$976 out of \$1,401 pension money received for his ward, and to set aside as fraudulent a conveyance of lands to Parsons from Beeson shortly before his death in 1892. The complaint was held insufficient, but on appeal to this court that judgment was reversed. *State v. Parsons*, 147 Ind. 579, 62 Am. St. 430. Each appellee filed a general denial. Parsons filed ten, and Harbaugh and Burris six, affirmative paragraphs of answer. The errors assigned question the sufficiency of each affirmative answer, the correctness of the conclusions of law, and the legality of denying a new trial.

One of the affirmative answers, filed by each appellee except Nagle, averred that in 1877 Beeson resigned his trust and made a final report of his receipts and disbursements as guardian up to that time; that the court examined and approved the report and discharged Beeson as guardian; that the court thereupon appointed Ridge as guardian and he received from Beeson the full amount of the trust estate in the latter's hands as found by the court; that in 1879 relatrix was nineteen years old and married to a man of full age; that thereafter in the same year Ridge filed a final settlement report, which he verified as a true and complete accounting of the trust; that a receipt in full, signed by relatrix and her husband, was indorsed upon and made a part of the final report; that the court, at the April term 1879, examined and approved the report and entered of record a judgment that the guardianship was finally settled and the guardian discharged; that the relatrix received and used the balance found due her on the final settlement; and that the judgment of final settlement has remained and is in full force.

Beeson reported and accounted for \$425 of the pension money. If he failed to account for \$976 of it, it was either

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through mistake or fraud. It was the duty of Ridge to collect and account for all sums due his ward. If he did not collect from Beeson, it was from ignorance of the alleged claim, from mistake or fraud. If he did collect from Beeson and failed to account, it was either from mistake or fraud. The guardianship was one continuous trust, irrespective of the number of trustees. It is evident that when Beeson resigned, he could not make a final settlement report in the guardianship, because the ward had not the legal capacity to settle. And so no statute of limitations would begin to run from the approval of Beeson's report. But when Ridge filed his report in final settlement, relatrix had the legal capacity to look after her own rights. If Ridge failed to account for all that had come to his hands, or if he failed to collect from Beeson all that the latter had received for his ward, relatrix not only had the right but she was challenged by the report to resist the final settlement on the terms proposed. Section 2403 R. S. 1881 and Horner 1897, §2558 Burns 1894, provides that a final settlement of an estate may be vacated within three years on account of "illegality, fraud or mistake in such settlement or in the prior proceedings". Section 2527 R. S. 1881 and Horner 1897, §2691 Burns 1894, requires that suits on guardians' bonds "shall be governed by the law regulating suits on the bonds of executors and administrators". By virtue of this latter section, it has been long settled that the former section applies to guardianships, and that the lapse of three years of opportunity is a complete bar. *State v. Hughes*, 15 Ind. 104; *Holland v. State*, 48 Ind. 391; *Briscoe v. Johnson*, 73 Ind. 573; *Candy v. Hanmore*, 76 Ind. 125; *Carrer v. Lewis*, 104 Ind. 438; *Carver v. Lewis*, 105 Ind. 44; *Wainwright v. Smith*, 106 Ind. 239; *Castetter v. State*, 112 Ind. 445; *Silvers v. Canary*, 114 Ind. 129; *Horton v. Hastings*, 128 Ind. 103; *State v. Parsons*, 147 Ind. 579, 62 Am. St. 430.

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As the truth of this answer was established by the special findings, it is unnecessary to inquire into the sufficiency of the other paragraphs. *Gunder v. Tibbits*, 153 Ind. 591, and cases collated on page 593.

The motion for a new trial does not challenge the admissibility or sufficiency of the evidence showing the judgment of final settlement. On the question of concealment, the evidence and the findings show that Beeson did nothing to prevent an investigation by relatrix of the amount of pension money received by him for her account. The failure to include all of the money in Beeson's report may have been due to mistake or fraud; but neither would prevent the limitation from running, because the three years time is given for the purpose of allowing relief from mistake and fraud.

Nagle, administrator of Beeson, may not have been entitled to the benefit of the answer filed by his co-appellees; but no question on this point is presented or assigned.

Judgment affirmed.

CITY OF SOUTH BEND ET AL. v. REYNOLDS.

[No. 19,218. Filed June 19, 1900.]

MUNICIPAL CORPORATIONS.—*Indebtedness.*—If the indebtedness of a city equals or exceeds the constitutional limit, and the current revenues are not sufficient to pay such indebtedness when it comes into existence, including other expenses for which the city is liable, an indebtedness is thereby created, and the Constitution is violated. pp. 71-73.

SAME.—*Municipal Indebtedness.—Lease of Building for City Purposes.*—A lease of a building by a city, to be used as a city hall, does not create an indebtedness for the aggregate sum of all the annual payments of rent to become due; and, therefore, where it appears that the current revenues of the city will be amply sufficient to meet the accruing rent, such contract is not invalid, though the city's constitutional debt limit has already been reached. pp. 73, 74.

From the St. Joseph Circuit Court. *Reversed.*

155	70
155	170
155	70
163	84
163	85

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O. M. Cunningham, A. Anderson, J. Du Shane, W. G. Crabill, T. E. Howard and J. G. Orr, for appellants.

F. E. Osborn, W. H. Sallwasser, N. J. Wolfe and J. H. Bradley, for appellee.

MONKS, J.—Appellee sued appellants, the city of South Bend and James Oliver, to enjoin them from carrying out a contract executed by them, on the ground that the city thereby became indebted beyond the constitutional limit. A demurrer to the answer for want of facts was sustained and judgment rendered in favor of appellee.

It appears from the record that the city of South Bend, on October 18, 1899, was the owner and in possession of certain real estate described in the complaint, which had been purchased and was held for the purpose of erecting thereon a city hall, for the use of the several departments of the city government; that on said day said city and James Oliver, a co-appellant, entered into a written agreement which provides that said Oliver have permission to enter upon said real estate and erect thereon a city hall for the use of said city, said structure to remain the property of said Oliver, unless and until the city should exercise the option given by said contract to purchase the same. That the hall shall be suitable for the needs of the city and according to named plans and specifications, the contract for construction to be left to the best bidder after due notice; the cost not to exceed \$75,000; and all contracts to be approved by the city. That the building when completed be leased to the city for twelve years, with a right of renewal for five years longer, at a rental of \$7,200, to be paid annually, as the same shall accrue from year to year. Oliver gives, and the city reserves, an option to purchase the building at the termination of the lease, or at any time during the term, at a price equal to the original contract price thereof with four per cent. interest per annum, less the sum of the several amounts of rent then paid thereon with four per cent. interest per annum on each item of said rent from

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the date of its payment. In case the city fail to exercise its option to purchase, Oliver has the option either to remove the building or to purchase the ground at its statutory appraised valuation within six months after the termination of said lease. Should he fail to exercise his option the structure thereby becomes the property of the city. In case the exercise of any option is delayed by any order of court or by some overpowering necessity, the time so lost is not to be counted. The city is to pay taxes and insurance, but in case of fire the insurance is to be invested in repair of the old building, or in the erection of a new one.

That when said contract was entered into, and since that date, said city was indebted in an amount equal to the constitutional limit; that said rent of \$7,200, to be paid annually by said city, was no more than the fair rental value of said building mentioned in said contract and described in the plans and specifications; that such expense for rent was a part of the current expenses of said city government and was amply provided for by the annual city tax levy; that there was already in the city hall fund, in the city treasury, nearly enough money for two years' rent and the current revenues for the year 1899 will provide more than enough for a third year's rent. If the foregoing facts show that by said contract said city became indebted beyond the constitutional limit, the judgment must be affirmed; otherwise, it must be reversed.

It is settled in this State that if a city contracts for water, light, or other things which pertain to its ordinary and necessary expenses, and agrees to pay for the same annually or monthly as furnished, such contract does not create an indebtedness for the aggregate sum of all the annual or monthly payments, because the debt for each year or month does not come into existence until it is earned. But if the indebtedness of the city already equals or exceeds the constitutional limit, and the current revenues are not sufficient to pay such indebtedness when it comes into existence, in-

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cluding other expenses for which the city is liable, an indebtedness is thereby created and the Constitution is violated. *Cason v. City of Lebanon*, 153 Ind. 567; *City of LaPorte v. Gamewell, etc., Co.*, 146 Ind. 466, 35 L. R. A. 686, 58 Am. St. 359, and cases cited; *Brown v. City of Corry*, 175 Pa. St. 528, 34 Atl. 854; *Appeal of the City of Erie*, 91 Pa. St. 398; 1 Dillon on Mun. Corp. §§136, 136a.

It is evident that rent for suitable offices, for the officers of a city, is as much an ordinary and necessary expense as the expense for water and light (*Grant v. City of Davenport*, 36 Iowa 396, 403), and that when the city agrees to pay the rent for said offices annually or monthly, the contract does not create an indebtedness for the amount of all the annual or monthly payments. While the rent for suitable offices for city officers is an ordinary and necessary expense, the erection of a city hall, or a building for the use of the city officers, is not in any sense an ordinary and necessary expense, but is an extraordinary one. *Grant v. City of Davenport, supra*. There is a clear and plain distinction between a contract for the use of rooms or a building for city purposes and the erection by the city of a building to be used for such purposes. The one is an ordinary and necessary expense, while the other involves municipal ownership of the building or rooms, the means of furnishing the offices, and is an extraordinary expense. *Brown v. City of Corry*, 175 Pa. St. 528, 34 Atl. 854; *Grant v. City of Davenport, supra*.

Under the contract in this case, however, the city hall is not to be erected by or for the city, but by Mr. Oliver who is to own the same, the city being the owner of the real estate upon which it is to be erected. The only contract of the city is to pay an annual rent of \$7,200 which is admitted to be only a fair rental value for said building, and if the city does not exercise its option to purchase said building at or before the termination of the lease, to sell and convey the real estate at the price named, provided said Oliver ex-

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ercises his option to purchase the same within six months after the termination of the lease. If neither party exercises the option provided for in said contracts, within the time fixed, then the city hall building becomes the property of the city.

Under said contract the city is under no obligation whatever to pay anything for the erection of said building or to purchase the same when erected. If it should attempt to exercise its option to purchase said building, but can not do so without violating the constitutional limitation as to becoming indebted, it may be enjoined from exercising such option. No facts are alleged in the complaint showing that the current revenues of the city will not be sufficient to pay the indebtedness for rent under said contract each year when the same comes into existence, including all other expenses for which the city is liable. The allegations of the complaint do not show, therefore, that said contract creates any indebtedness in violation of the Constitution. *Cason v. City of Lebanon*, 153 Ind. 567.

It follows that the judgment must be reversed. Judgment reversed, with instructions to carry appellee's demurrer to the answer back and sustain the same to the complaint.

 THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY v. SHEEKS.

[No. 18,530. Filed Feb. 20, 1900. Rehearing denied June 19, 1900.]

PLEADING.—*Complaint.*—*Proof.*—*Recovery.*—*Secundum Allegata et Probata.*—Where the gravamen of a paragraph of complaint was that plaintiff was injured by the derailment of defendant's passenger train, upon which she was a passenger, caused by a broken rail in a certain switch, in the construction of which defendant was guilty of negligence, proof of the substance of the material issues constituting the cause of action as set out in the complaint is sufficient to sustain a judgment for plaintiff, without proof of all the particular infirmities or deficiencies alleged in the complaint relative to the construction and maintenance of the switch. pp. 88-94.

155	74
160	641

155	74
161	91

155	74
163	865
163	868
163	309

155	74
165	705
165	707
165	708

155	74
169	38
170	209
170	210

155	74
171	166

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CARRIERS.—Negligence.—Personal Injuries.—The law exacts of a railroad company engaged in carrying passengers the highest practicable care for the safety of its passengers in the operation of its trains, and in keeping its road, machinery and appliances in a safe condition, and while the burden is upon the passenger suing for personal injuries to maintain the affirmative of the issue, the mere happening of the accident is at least *prima facie* evidence of negligence upon the part of the carrier. pp. 94-97.

SAME.—Negligence.—Personal Injuries.—In an action against a railroad company for personal injuries sustained by plaintiff by the derailment of the car in which she was riding, caused by running the train at a very high rate of speed down a heavy grade upon a curve having near its middle an unsafe switch, the company is not exonerated of the charge of negligence by the fact that the rail which broke weighed seventy pounds to the yard, was made by a reputable manufacturer, had been in use about eighteen months, was well spiked to sound ties, had been inspected a few hours before the accident, and there was nothing to indicate but what the switch was as safe for the use of trains at the time of the accident as it was before. pp. 97, 98.

SAME.—Contributory Negligence.—In an action for personal injuries to a railway passenger, a finding that the passenger at the time of the accident was seated in one of the seats of the chair-car, as directed by defendant's servants, and that the car was derailed and precipitated over a bank, shows an absence of contributory negligence upon the part of the passenger at the time of the accident. p. 98.

SPECIAL VERDICT.—Personal Injuries.—Aggravation of Injuries by Negligence of Plaintiff.—A special verdict in an action for personal injuries need not affirmatively show that the injuries received were not subsequently aggravated by any negligent conduct on the part of plaintiff. pp. 98, 99.

DEPOSITIONS.—Motions to Suppress.—Irrelevancy.—Where objections made to a deposition before trial go to the relevancy of the evidence therein, which might become relevant in any possible phase of the case, the court cannot be required to anticipate its propriety or impropriety in advance of its being offered in evidence. If the deposition, or any part thereof, was not relevant when it was offered to be read in evidence, objections thereto at that time should have been interposed. pp. 99, 100.

DAMAGES.—Personal Injuries.—Excessive Damages.—A judgment for \$15,000 for personal injuries sustained by a passenger in a railroad accident is not excessive, where it was shown that plaintiff received a severe nervous shock which caused a deep seated disease of the nerve centers, injured her spine so that she would suffer from same

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all of her life, resulting in partial paralysis of her limbs, and that by reason of such injuries she was rendered unfit to perform any labor, either mental or physical, and was so injured that she could never perform the functions of a wife or mother, and was rendered despondent so as to cast a gloom over her whole life. p. 100.

From the Marion Superior Court. *Affirmed.*

John G. Williams, W. H. H. Miller and J. B. Elam, for appellant.

J. E. McCullough, H. N. Spaan and A. J. Beveridge, for appellee.

JORDAN, J.—This action was instituted by the appellee to recover damages for personal injuries sustained by her, while a passenger, by reason of the derailment of a train.

The complaint is in five paragraphs. The answer was a general denial. There was a trial by jury and a special verdict returned which was framed, by means of interrogatories, under the act of 1895. The jury assessed appellee's damages at \$15,000. Motion by appellant for judgment in its favor upon the special verdict was denied, as was also its motion for a new trial; and judgment was rendered on the special verdict in favor of appellee; and these several rulings of the court are the only errors assigned.

Each of the five paragraphs of complaint alleges that appellant is a railroad corporation and a common carrier engaged in operating a railroad in the State of Indiana; and appellee, on the 28th day of January, 1895, was a passenger on one of its trains running from the city of Terre Haute to the city of Indianapolis; and as such passenger she had paid the usual fare which entitled her to be carried to the place of her destination.

We need not recite the particular grounds of negligence upon the part of the appellant to which appellee under either the first, second, or third paragraph of the complaint, attributes the accident, or derailment of the train, for the reason that the special verdict apparently rests upon and follows substantially the material facts alleged in the fourth

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paragraph of the complaint, and also in the fifth paragraph, so far as they relate in the latter to the derailment of the train in question being due to a defective and unsafe switch constructed and maintained by the appellant.

The fourth paragraph charges negligence upon appellant's part as follows: "That on the line of said railway, to wit, at or near the town of Coatesville, the defendant had, prior to the 28th day of January, 1895, negligently and carelessly constructed a switch, and was on said day, carelessly and negligently maintaining said switch thus carelessly and negligently constructed; that the defendant was guilty and negligent in the maintaining of said switch in this, to wit, the rails constituting the said switch, or movable portion of the track, and which are moved to the one side or the other according as the train was intended to be run on the main track or the side-track, should be securely connected, the one with the other, by a proper number of iron bars extending from the one to the other of such movable rails, and securely fastened to each, to the end that said movable rails should be securely fastened in their position in regard to each other; that there should be a sufficient number of bars thus connecting such movable rails, extending from the point where such movable rails join to the one connecting the track to the hinge where they are attached to the other of the connecting tracks, so that if either of the movable rails should be broken by or in the passage of the trains over the same, yet, notwithstanding such break in such rails, each piece thereof would be held in a firm position parallel to the other of said movable switch rails, and the train not thrown from the track; that such movable rails should be connected by such tie-bars at a point very near to each end of said movable rails, and at such intervening distances between such tie-bars thus near the ends of such rails as will effectually hold such movable switch rails firmly parallel to each other; or, in the event one of said rails shall be broken, hold the two pieces thereof

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parallel to the rail which has not been broken. The plaintiff avers in this case that the defendant, notwithstanding it well knew that the said switch should have been constructed as above described, wholly failed and neglected so to do, but, on the contrary, negligently and carelessly constructed said switch as follows: It placed on the inside of each of said movable rails, and at a distance of two or three inches therefrom, a guard-rail which was bolted through three cast iron fill blocks, some two or three inches in width, to the said switch rails, such guard-rails being those bolted to such switch rails at three points,—the first at a point a few inches from the free end of such switch rails, the second four feet therefrom, and the third four feet from said second point; that the outer point of such guard-rails extended a few inches out and beyond the free ends of said movable switch rails; that there were no tie-bars whatever connecting such movable switch rails, the only tie-bars used in the construction of such switch being the tie-bar connecting the ends of such guard-rails at a point outside and beyond the free ends of said switch rails, which tie-bar was also used as a throw bar to throw the switch from the one side to the other, according to whether the train was intended to run upon the main or side-track; that the said movable rails in said switch were nineteen feet long; that by reason of the construction of said switch in the manner just indicated for a great distance, to wit, ten feet from the hinge end of said movable switch rails, there was nothing whatever to hold the pieces of such switch rails, in the event of their or either of them being broken, parallel to each other, so as to prevent a train from running off the track of the said road, in the event that each of such switch rails should be broken; that by reason of the manner in which said switch had been constructed and was being maintained, the same was dangerous and defective, and that if either of the rails constituting the movable portion of said switch should be broken between the hinge end thereof and the attachment of said switch rail to said guard-

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rail, at the nearest point thereto, by or in the passage of a train of cars over the same, there would be great danger that all the cars of said train behind the one thus breaking said switch rail would be thrown from the track. And the plaintiff further shows that on the said 28th day of January, 1895, she was a passenger upon one of defendant's trains running over said portion of said road; that when said train came upon said switch, the engine upon said train, or some of the cars in said train in front of the car in which the said plaintiff was riding, broke one of the rails in said movable portion in said switch, at a point between the hinge end thereof and the point of its nearest attachment to said guard-rail, and, thereupon, and by reason thereof, the car in which this plaintiff was riding was with great force and violence thrown from the track, broken, and overturned, and that thereby this plaintiff was thrown with great force and violence upon and against the sides of said car, etc."

The fifth paragraph charges the negligence and the happening of the accident as follows: "That on said day said defendant was guilty of negligence in the operation and maintenance of its said road, and in the running of its said train over the same in this, to wit: That it negligently and carelessly erected a defective and dangerous switch on a curve in the line of its said road at or near the town of Coatesville, which switch was defective and dangerous in this, to wit: That the movable rails constituting the switch point, which are movable to the one side or the other, as desired, so as to cause the train to pass upon the one track or the other, as desired, were not properly held or fastened securely in their position with relation to each other, and so that if either rail should be broken the pieces thereof would be held in their position parallel to the other rail; that, on the contrary, said switch was so negligently and defectively constructed that if the engine or cars, forming the front portion of a train of cars, should break one of the switch rails, the portion of the train behind the engine or

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cars thus breaking such rail would be thrown from the track." This paragraph then proceeds further to allege as negligence upon the part of the appellant, first, that it used rails that were not sufficient to bear the trains and engines which were used by appellant in operating its road; second, that the engine in use upon the occasion of the accident was too heavy and too high, etc.; third, that the train, at the time it was derailed, was being run at a rate of speed far in excess of what was safe and prudent under the existing condition of things as therein set forth. The paragraph, continuing, charges: "That by reason of said negligent and careless conduct on the part of defendant, when the train in which this plaintiff was riding came upon said curve and switch, at or near the town of Coatesville, the car in which this plaintiff was riding was thrown with great force and violence from the track, and was broken and overturned, and that thereby this plaintiff was thrown with great force and violence upon and against the sides of said car," etc.

Eliminating from the special verdict facts or matters which may be said to be of an evidentiary character, and also what may be considered as mere conclusions upon the part of the jury, it may be said to embrace the following facts: On January 28, 1895, defendant was a common carrier of passengers for hire, and was operating a railroad between Greencastle and Indianapolis. The plaintiff, on that day, after procuring a ticket entitling her to ride on a train known as number twenty on said railroad, became a passenger on that train at Greencastle with the intention of riding to Indianapolis. This train was a fast passenger train, which left Greencastle about 2 o'clock p. m., and for at least two years had passed over defendant's road about the same time of day, made up substantially in the same way, and on January 28, 1895, consisted of about the usual number and about the same kind of cars, except that the private car of the president was attached to the rear of the train. The train was composed of an engine weighing 139,000

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pounds, a tender, two mail cars, a combination car, and five other cars, one of the five being a chair-car, and plaintiff was injured by reason of the derailment of part of the train. At the time of this derailment, plaintiff, as a passenger, was seated in one of the seats of the chair-car, as directed by the servants of the defendant, and that car was derailed, thrown from the track, precipitated over a bank and turned over. At the time of this derailment the train was running at a high rate of speed on a curved track, in a generally eastern direction, and the derailment and precipitation of the car down the bank was caused by the breaking and displacement of the north rail of a switch in the track at the point where the derailment occurred. Each of the rails in this switch was straight from end to end, but at the point where it was maintained there was a curve amounting to about two degrees. A train approaching this switch from the west would descend a continuous and heavy grade on a straight track from a point at least one-half mile west of said switch to a point about three hundred yards west of said switch, and then descend a continuous heavy grade upon a curved track to a point at least two hundred yards east of the switch.

On January 28, 1895, the switch in question was constructed as follows: On the inside of each of the movable rails of said switch, parallel therewith, and at a distance of two or three inches therefrom, there was a guard-rail of sufficient length to receive the bolts hereinafter described. The guard-rail was bolted through three cast iron fill blocks, some two or three inches in thickness, to the switch rail, such guard-rails being so bolted to said switch rails at three points,—first, at a point some few inches from the movable end of such switch rails; second, at a point some four feet from the movable end of the switch rails, and third, at a point some four feet from the said second point, with the outer point of such guard rails extending a few inches east

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of it and beyond the movable end of such switch rail, and with a tie-bar connecting the east end of said guard-rails at a point east of the east end of such switch rails, which tie-bar was also used to throw the switch from one side to the other, and no tie-bar whatever connected such movable switch rails or guard-rails, except the tie-bar at the end of the guard-rails above described.

At the point where this switch was maintained there was a side-track extending westward therefrom on the north side of the main track, and the west end or hinge end of the south rail of the switch connected with the south rail of the side-track, and the west end or hinge end of the north rail of the switch connected with the north rail of the main track, so that when the movable end of the switch was thrown to the north, a continuous line was formed from the main track, and with a train of cars passing from west to east on the main track, the north wheels of the train would run upon and along the north switch rail, and the south wheels along the south rail of the main track.

To secure reasonable safety in the operation of railroad trains, it is necessary to have the rails spiked to the ties on both sides at every eighteen or twenty inches, or, at the very most, about twenty-five inches. This is done, first, to prevent the rail from breaking, and, second, in a case of break, to prevent the displacement of the rail and the consequent derailment of the cars. It is not a fact that, where rails are secured and held by spikes, or, in case of switches by the tie-bars, there may be frequent breaks in the rails of a track without the derailment of the train of cars passing over such break.

In the construction of a switch it is ordinarily proper, to secure safety, so to fasten the two rails of the switch as to make them as rigid as possible. When a switch in a railroad track is used for passing fast trains over it, it is necessary, in order to secure reasonable safety, that the rails of such switch, if nineteen feet long, should, by means of tie-bars,

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at distances of not more than four feet apart, be secured, to prevent breaking and displacement of the rails and consequent derailment of the cars. At the time the cars in question in this case were derailed—on January 28, 1895, there were not any tie-bars connecting the two rails of the switch in question except the throw bar at the east end of the guard-rail, and for the whole length of the switch rail in question, to wit, nineteen feet, there was nothing that would prevent its displacement if it broke under a train. For ten feet of the switch rail in question there was nothing to prevent its being broken by a lateral pressure of the train, except the strength of the rail.

Steam was operating on the engine as the train in question approached said switch from the west on the day and trip of said derailment, and as it came down the grade and onto the switch; and when the train came upon said switch it was running at a rate of fifty miles, which was a higher rate of speed than its usual rate. The train was nineteen minutes late when it struck said switch, and its regular schedule time required it to run forty-five miles an hour. The locomotive engine which was drawing the train in question was extraordinarily large and heavy.

A sufficient number of tie-bars connecting the rails of a switch will not prevent a lateral movement of the rails. The switch in question was not so constructed as to prevent as much as possible such lateral movement, considering the necessity for moving the same. The evidence shows that when the track rails of the main track were properly spiked it is only very rarely that a broken rail will cause a train of cars to leave the track. A switch over which fast trains are run should be so constructed as that the rails composing the switch will be held as nearly as possible in place if a break should occur in one of the switch rails. The switch in question in this case was not so constructed. The derailment of the cars in question in this case was caused by the defendant running a very heavy passenger train at a

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very high rate of speed down a heavy grade upon a curve, having near its middle an unsafe switch. Said switch was located upon an embankment about ten feet high, at a place where there was a one-degree curve in the railroad track, the inner or shorter side of said curve being on the south side of the track. This curve was a light one.

The switch in question consisted, in part, of two movable rails, each nineteen feet long, connected with other rails of the track at the hinge end of the switch, and securely fastened to ties and the rails with which they connected. The point where these rails were so connected is called the heel of the switch, and the switch rails extended eastward from that point. Towards their eastward end said rails were planed off so as to be brought to a sharp point at the east end. This tapering point was about eight feet long from the place where the rail began to taper to the extreme sharp point thereof, and said planed or beveled part of the north movable rail was brought alongside and against a rail of full size when the switch was shifted to the north. The planed or beveled part of the south movable rail was brought against another rail of that size when the switch was shifted to the south. These planed and smaller portions of said switch rails were reënforced by rails of full size fastened thereto at intervals of about three feet, and extending from the sharp point westward about eight feet. The portions of the switch rails from the west end of said reënforcing rail to the heel of the switch were secured by spikes driven into the ties, and placed as near the rail as they could be driven and still allow the movement necessary in shifting a switch.

At the time of the accident the north movable rail of said switch was shifted to the north so that the planed portion of it came against a rail of full size, and that portion of said north rail between the west end of the reënforcing rail and the heel then rested against the spikes driven into the ties along the north side of said portion of said rail. The movable rails of said switch were tied together by a connect-

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ing bar near the east end thereof attached to the reënforcing rails. Said switch was known as a Channel split switch.

The accident was caused by a break in the north rail of said switch about eight feet from the heel thereof. There was no flaw in the rail at that point. A number of trains, including number twenty, had run over said switch each day for more than two years while it was placed and constructed as it was at the time of the accident. There was nothing in the condition and appearance of said switch rail to indicate that there was any more danger of its breaking at the time of said accident than there had been since it had been in use at said place. The snow had been swept from the switch about two and a half hours before the accident, and there was then nothing in the appearance of the switch at the time of the accident to indicate that it was not as safe as it had been before that time. There was nothing in the appearance of the switch at the time of the accident to indicate that it would not carry trains as it had been doing before.

At the time of the accident there was not any known means of preventing rails of a railroad from breaking. The probability of such breaking is greater in cold weather. The 28th day of January, 1895, was a cold day. The thermometer on that day indicated a temperature of ten degrees above zero. The switch rails in said Channel switch were made by the Carnegie Steel Company, of Pittsburgh, which was a reputable manufacturer of such rails. If a rail in a railroad track is broken upon a straight track, such breaking will sometimes derail a train. For more than three years the defendant, upon different parts of its railroad, had used a number of Channel switches of the same pattern with the one that broke at Coatesville, and laid in the same manner, and, under the evidence in this case, there was nothing developed by the use of said switches during the time named to suggest they were an unsafe kind of switch. The rails in the track at and near the point where said accident occurred were steel rails of the weight of seventy pounds per

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yard. The rails constituting the switch were placed there in the summer of 1893, and there was nothing before the happening of said accident to indicate that they were not heavy enough for the use to which they were put, nor was there anything before said accident to indicate that such rails would not safely carry the train and engine that were running over them at the time of the accident. The rail at the point it broke was a full sized rail, weighing seventy pounds to the yard.

The defendant had in its employ, at and immediately before the time of the accident, a sufficient and competent force of men charged with the duty of inspecting said switch and the track in the neighborhood thereof, and keeping them in proper condition. The section foreman having such portion of said railroad in charge inspected said switch about 8:45 a. m. on the day of the accident, and at that time said switch was in good condition and repair. One of the employes of defendant, belonging to the section force employed upon the section of defendant's road where said switch was placed, swept the snow from said switch at about 11:45 a. m. on the day of the accident, and at that time moved the east end of the switch backwards and forwards from north to south and from south to north, and said switch upon being so moved worked properly.

Said switch rails were full spiked to sufficient ties. Said ties were new and sound, and the railroad at the point where said switch was placed was well ballasted. The main track of defendant's railroad, east and west of said switch, and in the neighborhood thereof, was full spiked to good ties and well ballasted.

Said train was derailed immediately at the east end of said switch, and towards the south side of the railroad track. At the time of its derailment the train was not running at its usual schedule rate. This schedule rate was not too high for reasonable safety. Up to the time of the accident nothing had been developed in the operation of defendant's

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railroad to indicate that such schedule time was too high for reasonable safety. There were, in all, eight cars in the train, of which four at the rear of the train were derailed. The accident happened about 2:19 p. m.

At the time the cars were derailed, the plaintiff was seated in the chair-car next to the rear seat of the car. She was thrown about against the various objects in the car, and in such manner that when she became conscious she was at the front end of the chair-car. When she first became conscious she could not see or feel, but she feared, and had reason to fear, that the car was on fire. The horrors of her situation when she became conscious gave her such a nervous shock as to tend to bring about a deep seated disease of the nerve centers. Because of the injury she received at the time of said derailment she has become permanently lame in her right leg, so that probably she will have to walk on crutches the rest of her life; and her spine has become permanently injured so that she will suffer more or less therefrom all her life. She has become wholly unfit to perform any labor, either mental or physical, because of the injuries received at said time. She was so badly injured that she can never perform the function of a wife or mother. These conditions are permanent. Her injuries have rendered her despondent, so as to cast a gloom over her whole future life. Her lower limbs have become partially paralyzed because of the injury to her spine; her left arm has become partially useless by reason of her injuries so received at said time; she suffers at times with violent pains in her head and back because of such injuries received at said time, and for the same reason she is sleepless and restless; her right limb is very much shrunken, both above and below the knee; she suffers constantly from inability to breathe properly; is subject often to muscular tremors; has lost her appetite; the actions of her heart and bowels are seriously interfered with from time to time; she has been reduced in weight from 120 pounds to ninety pounds. She was in

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perfect health just before she was injured as aforesaid. At the time of her injury her income from acting as a trained nurse and giving massage treatment, and other matters, was at least \$800 a year. The regular pay of a trained nurse is from fifteen to twenty-five dollars per week, according to the kind of case she is employed in. From the time of the injuries until now the plaintiff has required the attendance of two nurses, alternately, her mother and her sister. A reasonable compensation for such nursing is \$1,000. The plaintiff, since her said injuries, has been totally and continuously disabled from work; has suffered great pain of body and distress of mind because of such injuries, and all of such injuries were caused to plaintiff by being precipitated in said car over and down said embankment.

It is insisted by appellant's learned counsel that their motion for judgment on the special verdict ought to have been sustained, and the motion of appellee for judgment thereon in her favor should have been denied,—first, because the facts found are not sufficient to authorize the conclusion, as a matter of law, that appellant was guilty of negligence, as charged in the complaint; second, because the facts are not sufficient to authorize the conclusion, as a matter of law, that there was absence of contributory negligence upon the part of appellee; third, that appellee must recover, if at all, upon the theory presented by her complaint, and that the facts contained in the special verdict do not sustain the theory of her complaint. Therefore, it is contended that the verdict was not sufficient to support a judgment for appellee on either the fourth or fifth paragraph of the complaint. They concede that, had appellee's complaint, by simple averments, disclosed that she, on the day named, having paid the required fare, became a passenger on one of appellant's trains, to be carried to a certain point, and that, during her passage, the train upon which she was being carried had been derailed, and thrown down a steep embankment, by reason whereof she sustained severe and

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permanent injuries, as alleged, all without any fault whatever upon her part, but being due solely to the negligence of appellant, that, on the trial, under the issues joined upon such a complaint, proof of the derailment of the train would be sufficient to make a *prima facie* case of negligence against appellant, and "a complete defense to the action could only be made by showing that the accident was one that could not have been prevented by the exercise of that high degree of care which the law requires of a carrier of passengers."

No such cause of action, it is said, as would have been stated under such general averments is presented by the complaint in this case, for the reason that, under each of its paragraphs, the negligence complained of is minutely and specifically stated; and appellant was therefore called upon to defend only against the particular negligence charged; and the right of appellee to recover depended upon satisfactory proof being made by her that appellant was guilty of negligence, as charged in her complaint.

It is further claimed that whatever right of recovery she may have, under the facts stated in the verdict, must rest exclusively either upon the fourth paragraph of the complaint or upon that part of the fifth paragraph which charges negligence upon the part of appellant in the use of an unsafe or dangerous switch. In support of this argument, counsel insist that the special verdict will not support the judgment for appellant upon the fourth paragraph, for the reason that it "presents the theory that appellee was injured by the derailment of the car in which she was riding; that this derailment was caused by the displacement of a piece of a rail which broke under the forward part of the train, and this displacement would not have occurred, if, in the performance of its duty, appellant had been using a switch of the kind it is declared appellant was in duty bound to use. No case is presented by this paragraph of failure to use a switch that would prevent, *as nearly as possible*,

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the displacement of the pieces of the broken switch rail. The theory is that appellant was required to use the switch described in that paragraph, which, it is averred, should have been constructed with tie-bars in a manner that would 'effectually hold such movable switch rails firmly parallel to each other; or, in the event one of such rails shall be broken, hold the two pieces thereof parallel to the rail which has not been broken.' "

Continuing, counsel insist that the issues thus presented must not be confused with one involving the question whether or not appellant was using a switch of such a kind as that in the event one of the switch rails should break under a passing train the pieces thereof "would be held, *as nearly as possible*, in place and *as nearly as possible* parallel with the other switch rail". Upon this view of the case the insistence is that the principal question to be tried and determined, under the issues joined upon the fourth paragraph, was: "Can a switch, by the use of a sufficient number of tie-bars, be so constructed as that any displacement of the pieces of a rail that breaks under a passing train will be prevented and the train be not thrown from the track?"

It is conceded that possibly appellee may contend that the special verdict discloses that the train, upon which she was a passenger at the time of the accident, was derailed, and that the injuries of which she complains were thereby inflicted; therefore, under the rule applicable to cases by a passenger against a carrier, the derailment in question would raise a presumption of negligence against appellant, to the extent that reasonable safety required the use of tie-bars in switches, to prevent, as much as possible the breaking and displacement of the switch rails; that the switch in question had no tie-bars, and was not constructed in a manner that would prevent, as much as possible, lateral motion of the switch; and therefore the facts found by the verdict are sufficient to authorize the conclusion that appellant's negligence caused the injuries mentioned in the complaint.

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It is contended, however, that upon this view of the question the verdict does not embrace facts sufficient to support a recovery, for the reason that the presumption of negligence, arising out of the derailment of the train, is entirely destroyed or overcome by other facts embraced in the verdict.

Counsel's interpretation of the fourth paragraph of the complaint, in respect to its theory and the burden which it cast upon appellee, can not in reason be tenable. It can not be successfully asserted that because she by her complaint has been more particular and specific in describing the deficiencies of the switch in controversy than was necessarily required, therefore she can not recover unless she proves all the particular defects as charged in the complaint. Reduced to a simple proposition, the gravamen of the fourth paragraph of the complaint may be said to be that, while the relation of passenger and carrier existed between appellee and appellant, she was injured by the derailment of the train upon which she had taken passage; that the derailment was due to a broken rail in a certain switch located on appellant's road near the town of Coatesville, in the construction and maintenance of which switch appellant was guilty of negligence. It can not be said that the complaint charges only specific acts of negligence, and none in general. It is true that appellee was not content to stop at the general averments of negligence in respect to the switch which caused the accident; but she proceeded to particularize or point out with more precision than was required, under the circumstances, the deficiency of the switch which rendered it unsafe.

Ordinarily, a complaint, under the rules of good pleading, is required to be particular enough to apprise the defendant of the substantial case which the plaintiff will seek to establish upon the trial; and such a general statement of facts, either in a complaint or answer, as will admit of almost any proof, is bad pleading. In cases like the one at bar,

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where the relation of passenger and carrier existed at the time of the accident, less certainty or particularity, in charging the negligence to which the injury sustained is attributed, is required than is in cases of a different character arising out of negligence. The principal reason which supports this rule is obvious. The carrier is presumed to be familiar with its own road and also with the appliances and means employed in the operation of its trains and the transportation of passengers over its road. All of these are considered to be matters peculiarly within the knowledge of the carrier; and when a passenger sues for an injury sustained by him on account of an accident due to the negligence of a carrier in the operation of its trains, or to its negligence in the construction and maintenance of its road, or to its negligence in the use of appliances or means of transportation, it is not incumbent upon him to state in his complaint the particulars constituting the negligence of which he complains. *Louisville, etc., R. Co. v. Hendricks*, 128 Ind. 462; *Anderson v. Scholey*, 114 Ind. 553; *Cincinnati, etc., R. Co. v. Chester*, 57 Ind. 297; *Clark v. Chicago, etc., R. Co.*, 15 Fed. 588; Thompson on Car. p. 547, §9; *Ware v. Gay*, 11 Pick. 106; *Eldridge v. Long Island R. Co.*, 1 Sand. (S. C.) 89; *Allender v. Chicago, etc., R. Co.*, 37 Iowa 264.

It certainly can not be true, as counsel for appellant seemingly contend, that, under either the fourth or fifth paragraph of the complaint, the principal question to be decided upon the issues joined thereon was: Could a switch, by the use of a sufficient number of tie-bars, be so constructed that any displacement of the pieces of the switch rail, when broken by a passing train, would be prevented? Upon this assumption counsel advance the argument that, in order to recover, appellee must prove that the switch in question could and ought to have been so constructed, that the rails thereof would have been securely fastened in their position to each other, so that in the event either of the rails broke under a train, the pieces of such broken rail would be held in their position and prevent a derailment of the train.

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It is then asserted that, inasmuch as the special verdict does not disclose that it is possible to construct such a switch, but does show that it is impossible to do so, it must follow that the appellee has failed to maintain her action.

We concede the contention of appellant's counsel that it is a familiar rule that a plaintiff must recover *secundum allegata et probata*. The recovery, if at all, must be upon the cause of action stated in the complaint, and where the court or jury finds upon a cause substantially different from the one alleged in the complaint, the plaintiff will fail. But it must be remembered that there is another familiar rule of practice which authorizes a recovery when the plaintiff has proved the substance of the material issues constituting the cause of action set forth in his complaint.

One of the essential issues under either of the above mentioned paragraphs is: Was appellant's road, at the time of the accident, unsound and unsafe by reason of the defective switch which is alleged to have caused the derailment by reason of its broken rail? This evidently is the theory upon which each of these paragraphs proceeds. It is true that the essence of the infirmity imputed to the switch by the particular averments of the complaint is a deficiency of iron bars connecting the movable rails.

The charge in the paragraphs mentioned, to the effect that the negligence of appellant arises out of its constructing and maintaining this switch in a defective and unsafe condition, possibly, under the circumstances, had the effect of relieving appellant on the trial from meeting or attempting to disprove any other negligence in regard to the derailment of the train, for the reason that appellee, having charged appellant with being alone guilty of negligence in respect to the switch, would, upon the trial, be confined to that theory, and could not rely upon other grounds of negligence as the result of the accident. Upon no view of the case can it be said, we think, that appellee, in order to succeed, must prove all of the particular infirmities or deficien-

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cies alleged in regard to the switch. As heretofore stated, proof of the essence or gravamen of her cause of action would be sufficient. The facts alleged in the complaint, disclosing as they do the relation of passenger and carrier, also the occurrence of the accident and the injuries sustained by appellee thereby, enable her to avail herself of the benefit of the rule which authorizes, upon the consideration of such facts, the presumption of negligence upon the part of the carrier. The charge as to appellant's negligence in the construction and maintenance of the switch was notice to it to bring forward facts to show that there was no negligence in this respect, but it certainly can not be affirmed that, by the particular averments in her complaint, she thereby relieved appellant of the burden of showing, under the circumstances, what the law exacted of it.

The duty of a railroad company engaged in carrying passengers is one well defined. While the company, as a carrier of passengers, is not an insurer of their safety, still, in consideration of the great danger to human life consequent upon the neglect of duty upon the part of the company, the law exacts of it the exercise of the highest practicable care for the safety of its passengers in the operation of its trains, and in keeping its road, machinery, and appliances in a safe condition; and for any failure to exercise such care, and for a slight neglect of its duty in this respect, it is liable to a passenger, who is himself without fault, for an injury sustained as the result of such negligence. *Louisville, etc., R. Co. v. Hendricks*, 128 Ind. 462; *Louisville, etc., Ferry Co. v. Nolan*, 135 Ind. 60, and cases there cited; 4 Elliott on Railroads, §§1586, 1587, 1588, 1589.

Of course, where one sues a railroad company for injuries received, through its negligence, while a passenger on its train, he has the burden of proving negligence and all of the other material facts which constitute his cause of action; and this *onus*, as we have already said, rested upon appellee. By reason of the high degree of care and dili-

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gence which a railroad company is required, at its peril, to exercise for the safety of its passengers, another well settled rule heretofore mentioned, in regard to the presumption of negligence in cases like this, obtains. This presumption is said to arise against the carrier where an accident happens on its road by which a passenger receives an injury by derailment of a train or breaking down of its road bed, carriages, equipments, or other appliances owned or controlled by such company and used by it in the operation of its road. While the burden is upon the passenger suing to maintain the affirmative of the issue, still, under such circumstances, the mere happening of the accident is at least *prima facie* evidence of the negligence upon the part of the company or carrier, and it will be incumbent upon the latter to produce evidence which will excuse the *prima facie* failure of duty on its part; or, in other words, it has the burden of proving, in order to rebut the presumption of negligence, under the circumstances, that the accident could not have been avoided by the exercise of the highest practical care and diligence. *Pittsburgh, etc., R. Co. v. Williams*, 74 Ind. 462; *Memphis, etc., Co. v. McCool*, 83 Ind. 392, 43 Am. Rep. 71; *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *Bedford, etc., R. Co. v. Rainbolt*, 99 Ind. 551; *Cleveland, etc., R. Co. v. Newell*, 104 Ind. 264, 54 Am. Rep. 312; *Louisville, etc., R. Co. v. Jones*, 108 Ind. 551; *Anderson v. Scholey*, 114 Ind. 553; *Louisville, etc., R. Co. v. Snyder*, 117 Ind. 435, 10 Am. St. 60, 3 L. R. A. 434; *Louisville, etc., R. Co. v. Hendricks*, 128 Ind. 462; *Louisville, etc., R. Co. v. Miller*, 141 Ind. 533; *Edgerton v. New York, etc., R. Co.*, 39 N. Y. 227; Elliott on Railroads, §1644; Hutchinson on Car., §800; Thompson on Car., pp. 210, 211; *vide* authorities collected in note to *Farish v. Reigle*, 62 Am. Dec. 679.

In *Edgerton v. New York, etc., R. Co.*, *supra*, the reason for the rule is aptly stated as follows: "Experience proves that when the track and machinery are in this con-

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dition, and prudently operated, the trains will keep upon the track, and run thereon with entire safety to those on board. Whenever a car or train leaves the track, it proves that either the track or machinery, or some other portion thereof, is not in a proper condition, or that the machinery is not properly operated, and presumptively proves that the defendant, whose duty it is to keep the track and machinery in the proper condition, and to operate it with the necessary prudence and care, has, in some respect, violated this duty."

In *Louisville, etc., R. Co. v. Jones*, 108 Ind. 551, the rule in question is expressed as follows: "When the plaintiff made it to appear that she was a passenger upon appellant's train, and, while being carried as such, the car in which she was seated left the track and she suffered injuries thereby, she had shown a state of things upon which a presumption of negligence arose against the railroad company, which stood with the force and efficiency of actual proof of the fact, and was available for her benefit until negatived and overthrown, and that such presumption can only be overthrown by proof that the casualty 'resulted from inevitable or unavoidable accident, against which no human skill, prudence or foresight, as usually and practically applied to careful railroad management, could provide.'"

The cause of action alleged in the fifth paragraph of the complaint, so far as the issue of negligence is charged to arise out of the construction and maintenance of the defective and unsafe switch, is substantially the same as that alleged in the fourth paragraph of the complaint; and upon such issue, as well as others, the special verdict may be said to respond to the cause of action alleged in either of these paragraphs. If either of these paragraphs can be said to state a good cause of action, in respect to the issue of negligence upon the part of appellant, which its counsel does not deny, it is evident, then, that the facts embraced in the verdict, when tested by the well settled principles of law

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to which we have referred, establish that issue in favor of appellee.

It is not necessary that we give an extensive review in this opinion of the facts disclosed by the verdict. It is sufficient to say that there are facts stated therein, among others, which unquestionably show that appellant, at and previous to the accident, was a common carrier of passengers, engaged in operating a railroad; that the relation of carrier and passenger existed between it and appellee; and that the latter was injured by reason of the derailment of a train upon which she had taken passage. The accident, as the facts disclose, was caused by the breaking and displacement of one of the rails of a switch on appellant's railroad at the place where the derailment of the train occurred. The facts further disclose that appellant had failed to exercise that high degree of care and diligence, which the law exacts, in the construction and maintenance of the switch so as to secure the reasonable safety of the passage of trains thereover.

When the facts in respect to the happening of the accident, and the cause thereof, are considered and tested by the rule previously asserted in regard to the presumption arising therefrom, which rule, it may be said, is applicable in cases of this kind, in determining the sufficiency of a special verdict, to support a judgment in favor of the plaintiff therein, it certainly is apparent that the facts, at least substantially, establish in favor of appellee the issue of negligence alleged in her complaint. The facts in the verdict, which may be said to be most favorable to the appellant, fall short, we think, of excusing or exonerating it of the charge of negligence established against it by the verdict. It is apparent from the facts found that everything in regard to the unsafe condition of appellant's road, at the point of the accident, could have been as well ascertained before the accident as after, had appellant exercised, under

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the circumstances, the care and diligence required. There was no flaw in the broken rail, as the facts show, and it does not appear in any manner that the infirmities of the switch were, prior to the accident, in any manner latent or hidden from the observation of appellant's servants. It is true that it appears, as insisted, that the rail which broke weighed seventy pounds to the yard, and was made by a reputable manufacturer; that it had been in use about eighteen months, and was well spiked to sound ties, and there was nothing to indicate, at the time of the accident, but what the switch was as safe for the use of trains at that time as it was before. It further appears that the switch had been inspected but a few hours before the accident occurred. Giving these facts and others all the force that can be legitimately claimed for them, they fail to establish that the accident was unavoidable or could have been prevented by the exercise of the highest practicable degree of care and diligence in the construction and maintenance of the switch in controversy. Certainly these facts can not in reason be held, in view of the well settled and controlling rules heretofore mentioned, to be sufficient to overcome the negligence against appellant under the facts set out in the verdict. The burden, as heretofore said, rested upon appellant to establish facts which would overcome or disprove the negligence which the facts in the verdict established. In this it has clearly failed. The special verdict discloses that at the time of the accident appellee as a passenger was seated in one of the seats of the chair-car, as directed by appellant's servants, and that this car was derailed and precipitated over the bank. It is virtually conceded by appellant's counsel, and properly so, we think, that these facts, under the decision in the appeal of *Louisville, etc., R. Co. v. Miller*, 141 Ind. 533, 553, show that, at the time of the accident, there was an absence of contributory negligence upon the part of appellee.

It is insisted, however, that the verdict must go further,

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and also affirmatively show that the injuries which she received, by reason of the accident, were not subsequently aggravated by any negligence or conduct on her part. If appellee, by her negligence, after receiving the injuries due to the accident, aggravated the same, or omitted, under the circumstances, to exercise ordinary care to cure and restore herself, these were manifestly matters of defense, and the burden of proving them was upon appellant. *City of Goshen v. England*, 119 Ind. 368, 5 L. R. A. 253.

The case of *Wabash R. Co. v. Miller*, 18 Ind. App. 549, is not an authority in support of appellant's contention. In that case the question involved did not pertain to the aggravation of damages, but, under the facts therein, it related to the care which the plaintiff was required to exercise in the first instance in order to prevent damages. It must follow, and we so adjudge, that the court did not err in rendering judgment in favor of appellee on the special verdict.

It is next contended that the court erred: (1) In denying appellant's motions, made in advance of the trial, to suppress in whole and in parts the deposition of Charles W. Cornwell; (2) that the verdict of the jury is contrary to the evidence; (3) that the damages are excessive. In regard to the motions to suppress the deposition in question, each of them assigned as a reason and proceeded upon the theory that, because the deponent had visited the place of the accident sometime after its occurrence, and, at the time of such visit, made the measurements and inspections to which he testified, and because the deposition disclosed that the situation between the time of the accident and the visit of the deponent had changed, therefore it was insisted that the deposition as a whole and in part ought to be suppressed as the evidence was not relevant. No objections appear to have been made to the deposition when it was offered and introduced in evidence.

Where the objections made to a deposition before a trial

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go to the relevancy of the evidence therein, which might become relevant in any possible phase of the case, the court can not be required to anticipate its propriety, or impropriety, in advance of its being offered in evidence. *Worley v. Hineman*, 6 Ind. App. 240, and cases there cited.

If the deposition or any part thereof was not relevant when it was offered to be read in evidence, objections thereto at that time should have been interposed. No available error, under the circumstances, can be predicated upon the ruling of the court in denying the motion to suppress the deposition.

We have read and considered the evidence, and are satisfied that it fully supports all of the material facts found in the verdict in favor of appellee, and we would not be justified in disturbing the judgment upon the ground that it is contrary to the evidence. The facts in the verdict which disclose the injury, suffering, and permanent disability and lamentable condition of the appellee, as results of the accident, her previous earning capacity, etc., are all sustained by the evidence. In consideration of these facts and matters, we would not be justified in adjudging that the damages are excessive. The assessment in question is not so large, under the circumstances, as to induce the belief that the jury, in fixing the amount, was actuated by prejudice, partiality, or corruption. *Illinois, etc., R. Co. v. Cheek*, 152 Ind. 663.

There is no available error, and the judgment is, therefore, affirmed.

**THE MAULE COAL COMPANY, ETC., v. PARTENHEIMER,
ADMINISTRATOR.**

[No. 18,767. Filed December 13, 1899. Petition for substitution of party overruled June 19, 1900.]

STATUTES.—Subject-Matter.—Title.—Mines and Mining.—Constitutional Law.—The act of 1891 (Acts 1891, p. 57) regulating the operation of coal mines and vesting the right of action for the recovery

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for the death of an employe in certain persons, is not invalid as embracing more than one subject and matters properly connected therewith, nor because of its failure to express the subject of the act in the title thereof, under the provision of article 4, §19 of the State Constitution that "every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title." *pp. 104-109.*

MINES AND MINING.—Death by Wrongful Act.—Action.—Parties.—Damages.—Under the provision of the act of 1891 (Acts 1891, p. 57) relating to coal mines, vesting the right of action for the recovery for the death of an employe in certain persons therein named, the administrator of a deceased employe of a coal mining company, operated under the provisions of said act, cannot maintain an action for the death of such employe, caused by an explosion of gas in the mine, although decedent was employed therein as a blacksmith at the time of the accident, and was not engaged in actually mining coal. *p. 109.*

APPEAL AND ERROR.—Parties.—Substitution.—Where a cause was reversed on appeal for the reason that the right of action was vested in a person other than appellee, the person authorized to maintain the action in the court below cannot be substituted as a party during the time granted for filing a petition for a rehearing and be allowed to occupy the same position, and exercise the same rights, as though he had been originally a party to the action. *pp. 109-112.*

From the Gibson Circuit Court. *Reversed.*

A. Gilchrist, C. A. De Bruler, L. W. Gudgel, W. H. H. Miller and J. B. Elam, for appellant.

L. C. Embree, for appellee.

JORDAN, J.—This action was commenced and prosecuted in the lower court by appellee, as administrator of the estate of Robert Poneleit, against appellant, the Maule Coal Company of Princeton, Indiana, to recover damages on account of the death of his decedent caused by the alleged negligence of appellant.

The complaint is in three paragraphs and it discloses that the defendant, appellant herein, is a corporation organized under the laws of this State and is engaged in operating a certain coal mine in Gibson county, Indiana. This mine, at the time of the fatal accident, is alleged to have been over the depth of 400 feet, and was reached by an open

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shaft. Appellee's decedent, at and prior to the date of his death, was in the employ of appellant at work about this mine in the capacity of a blacksmith. The complaint gives a description of the manner in which the mine was ventilated, and it appears, from the averments therein, that dangerous and explosive gases collected in the mine, which the defendant neglected to expel by necessary appliances provided for ventilation, and that the persons employed therein were not provided with suitable safety lamps so as to prevent an explosion of such gases. It further appears from the complaint that appellee's decedent, on the day of the accident, was directed by appellant's superintendent to go down into the mine to repair a door; that he was supplied with an open miner's lamp, and assurances were given him that the mine was free of gas and that it was safe for him to work therein. After he had descended into the mine and while there engaged in doing the work mentioned, appellant, it is charged, allowed certain cages, which ran up and down the shaft and connected the mine with the open air, to remain suspended in the shaft in such a position as to interfere with the ventilation of the mine; and that it further negligently permitted certain fans, intended and used to ventilate the mine, to be stopped, on the day of the accident, for over one hour; by reason of which a large amount of gas, which had accumulated in the mine, ignited from the fire of open lamps to which it was exposed; and that such gas exploded with great force and thereby caused the death of the decedent.

It is also charged that Robert Maule, employed by appellant as superintendent and mine boss, was incompetent for the discharge of the duties imposed upon him as such mine boss; and the complaint further discloses that the number of men, employed by appellant in the operation of the mine, was ten and over; and it is also disclosed that the deceased left surviving him a widow and certain minor children dependent upon him for support; and that plain-

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tiff was duly appointed administrator of his estate; and it further appears, under the averments of the pleading, that the decedent, at the time of the accident, was not guilty of contributory negligence. A demurrer for insufficiency of facts was overruled to each paragraph of the complaint, and, upon the issues joined, a trial by jury resulted in a verdict in favor of appellee and, over appellant's motion for a new trial, judgment was rendered thereon.

It is first contended by appellant's counsel that the complaint is insufficient on demurrer for the reason that the action can not be prosecuted or maintained by appellee as administrator of the deceased employe. It is insisted that the action falls within and is governed by the provisions of an act of the legislature pertaining to coal mines, approved March 2, 1891 (Acts 1891, p. 57, §7461 *et seq.* Burns 1894), and that the right of action, which appellee seeks to enforce, is lodged by the legislature, under the thirteenth section of that statute, in the particular persons therein designated. This section reads as follows: "That for any injury to person or persons or property occasioned by any violation of this act, or any wilful failure to comply with any of its provisions, a right of action against the owner, operator, agent or lessee shall accrue to the party injured for the direct injury sustained thereby, and in case of loss of life by reason of such violation, a right of action shall accrue to widow, children, or adopted children, or to the parents or parent, or to any other person or persons who were before such loss of life dependent for support on the person or persons so killed, for like recovery for damages for the injury sustained by reason of such loss of life or lives." If this contention can be sustained, it will necessarily result in a reversal of the judgment, for the rule of practice is well settled that a demurrer to a complaint, for insufficiency of facts, calls in question the right of the plaintiff to maintain the action. *Board, etc., v. Kimberlin*, 108 Ind. 449, and cases there cited.

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Counsel for appellee, however, insists that section thirteen, *supra*, which confers the right of action upon persons in the order therein named, can not be considered as controlling in this action for the reason that it must be held invalid when the law, of which it forms a part, is tested by section 19, article 4, of the State Constitution, which provides that: "Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

The contention is that the statute in controversy violates this provision of our organic law in two respects: (1) That it embraces more than one principal subject; (2) that there is no general subject expressed in the title of the act. It is insisted that the statute is clearly open to the first objection because the first five sections thereof relate exclusively to the subject of weighing coal delivered from coal mines; and, hence, it is argued, that the section vesting the right of action in the widow or children of a husband and father, whose death is caused by the violation of the provisions of the act in question, is wholly incongruous to the general subject, which, it is insisted, is that relating to weighing coal; and, therefore, is not a matter germane to or properly connected with the general subject.

The validity of the law being assailed, that question must necessarily be first determined. The title of the act in dispute is as follows: "An act regulating the weighing of coal, providing for the safety of employes, protecting persons and property injured, providing for the proper ventilation of mines, prohibiting boys and females from working in mines; conflicting acts repealed, and providing penalties for violation." The statute is divided into some twenty-four sections, some of which, as heretofore stated, regulate the weighing of coal delivered from any coal mine in this State,

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operated by any owner, agent, or lessee of such mine; while others pertain to the manner in which the mine shall be supported in order to protect persons working therein; and others provide for the proper ventilation of the mine, so as to keep it at all times free from "standing gas"; and also provide for or designate means by which the proper ventilation of a coal mine may be secured; and further provides that a competent mining boss shall be employed, who shall keep a careful watch over the ventilating apparatuses and airways of the mine, etc. An inspection of the statute clearly discloses that the general subject, covered by the legislation therein, is one concerning or relating to coal mines, and that the part thereof which vests the right of action for a recovery of damages arising out of the death of a person caused by the violation of any of its provisions, or wilful failure to comply therewith upon the part of the owner, operator, agent, or lessee, in the widow or children of the deceased, or other persons in the order named in the section in question, is incidental or auxiliary to the principal subject upon which the legislation is had; and, consequently, is a matter properly connected therewith.

It is true that this statute may be said to embrace a plurality of objects or purposes which the legislature had in view, and towards which, in order to carry them into effect, the legislation, under the act in question, was directed. It is obvious, however, that such legislation includes only one principal or general subject which, as previously said, is that concerning or relating to coal mines; and it is equally clear, we think, that the several provisions contained in the body of the act are matters or details incidental to this general subject and, as such, are properly connected therewith. *State v. Gerhardt*, 145 Ind. 439, 33 L. R. A. 313, and cases there cited.

It may be asserted that the constitutional restriction is obeyed by the legislature in the enactment of a law, if its provisions relate to the one subject as indicated by the title,

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and in some reasonable sense may be considered as auxiliary to such subject. The title of the law in controversy is not a model and, perhaps, is open to criticism. It at least may be said, however, that it substantially responds to the mandate of the Constitution. The form and terms employed in framing the title possibly operate to give expression, by parts, to the general subject to which the proposed legislation relates. When these parts, as expressed in the title, are taken and considered collectively, they constitute such a title as serves fairly to point out or disclose the general subject-matter, coal mines, over which the legislature proposes to legislate; and this renders it sufficient.

It is true, also, that the title, as framed, may be said to reveal that the legislators had several matters or purposes in view, some of which may be enumerated as follows: (a), to regulate the weighing of coal; (b), to provide for the proper ventilation of mines; (c), to prohibit boys and females from working in coal mines. While these indicated that the proposed legislation embraced several purposes which were intended to be carried into effect thereby, still they did not constitute each a distinct, separate, general subject, as appellee would seem to insist, but each and all were matters incidental to, and properly connected with the general subject concerning coal mines to which the act was intended to apply.

To express the subject of a statute in the title, in compliance with the requirement of the Constitution, no particular form or terms are exacted, nor is it essential that such subject be expressed with precision. The title will sufficiently conform to the command of the Constitution if it be so framed and worded as fairly to apprise the legislators, and the public in general, of the subject-matter of the legislation, so as reasonably to lead to an inquiry into the body of the bill. The constitutional requirement may be interpreted to mean that the act and its title must correspond, not literally but substantially, and such corre-

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spondence is to be determined in view of the subject-matter to which the legislation relates. *Benson v. Christian*, 129 Ind. 535; *State v. Kolsem*, 130 Ind. 434, 14 L. R. A. 566; *Lewis v. State*, 148 Ind. 346; *Gustavel v. State*, 153 Ind. 613; *McCommons v. English & Co.*, 100 Ga. 653, 28 S. E. 386.

In *Lewis v. State*, *supra*, we said: "The degree of particularity with which the title of an act is to express the subject thereof is not defined by the Constitution, and rests with the legislature. Courts, in this respect, are inclined to entertain and adhere to a liberal rule, and will not condemn an act of the legislature for the reason alone that the subject thereof is not as fully expressed as it otherwise might have been."

If we even entertained a reasonable doubt as to whether the subject of the act in question was as clearly expressed in its title as the Constitution required, in obedience to a well settled rule, we would be bound to resolve such doubt in favor of the validity of the statute. *State v. Tucker*, 46 Ind. 355. We conclude, therefore, that the title is sufficient and that the act does not embrace a plurality of subjects and is not open to the constitutional objections urged by counsel for appellee.

The validity of the law being affirmed, at least to the extent of the attack made by appellee, it is evident, we think, that it must be held to apply to all employes who may be injured or killed in the line of duty while engaged in or about a coal mine where ten men or over are employed. This is certainly within the meaning and contemplation of the law. That the particular mine, at which appellee's decedent was employed when killed, falls within the provisions of the statute in question, is fully disclosed by the complaint, as it appears from that pleading that ten men and over were employed by the defendant in its coal mine.

By section twenty-two of the act, coal mines, in which

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less than ten men are employed, are the only ones which are excepted from its provisions. The thirteenth section of the statute, as we have seen, expressly vests the right of action, which appellee, as administrator, is seeking to enforce, in the widow of the deceased; and we are satisfied that she is the person authorized to maintain and prosecute this action.

Section 285 Burns 1894, §284 R. S. 1881 and Horner 1897, which empowers the personal representative to maintain an action for damages, where the death of his decedent has been caused by the wrongful act of another, is general in its nature and character, while the provisions in the law relating to coal mines are special, and apply only to cases connected with that act; and, therefore, must control in the case at bar.

The statute in question is quite similar to that enacted by the legislature of Illinois in 1872; in fact, its provisions, in the main, appear to have been borrowed from the law of that state. By the latter law, where the death of a person is the result of any wrongful violation or wrongful failure, upon the part of the mine owner or operator, to comply with its provisions, a right of action, for the recovery of damages on account of such death, is given to the widow of the deceased, or to his lineal heirs, adopted children, or other dependent persons. In the case of *Litchfield Coal Co. v. Taylor*, 81 Ill. 590, it was held that the widow of a person, who was killed by the wrongful conduct of the defendant coal company, in using uncovered cages for the purpose of conveying its miners into and out of its mine, and in hoisting coal from the mine at the same time when the miners were being hoisted therefrom, was the proper person to maintain the action, and that the administrator of the deceased husband was not authorized to institute or maintain the action under the general statute of that state which empowers a personal representative of the deceased person, whose death was due to the wrongful act of

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another, to sue for and recover damages on account of such death.

In view of the plain purpose of the statute and in obedience to the rule well affirmed by the authorities, we can see no escape from holding that this action, under the facts, falls within the terms of the act in controversy, and that the surviving widow of the deceased, and not his administrator, is the proper person to sue for damages resulting from his death; and we are constrained to conclude that appellee can have no standing in court to maintain this action. In support of this holding, in addition to the authorities cited, see the following cases: *Spiva v. Osage, etc., Co.*, 88 Mo. 68; *Gibbs v. City of Hannibal*, 82 Mo. 143; *McNamara v. Slavens*, 76 Mo. 329; *Shepard v. St. Louis, etc., R. Co.*, 3 Mo. App. 550; *McClure v. Alexander (Ky.)*, 24 S. W. 619; *McCormack v. Terre Haute, etc., R. Co.*, 9 Ind. 283.

The contention of appellee, that, by reason of the fact that his decedent appears to have been employed at the coal mine as a blacksmith, at the time of the fatal accident, and was not engaged in actually mining coal, must result in excepting this case from the provisions of the statute in controversy, is without force.

As to the right of the widow to be substituted as plaintiff in this action, in the place of appellee, we intimate no opinion.

It follows, for the reasons stated, that the court erred in overruling the demurrer to each paragraph of the complaint; for which error the judgment is reversed, and the cause is remanded to the lower court for further proceedings not inconsistent with this opinion.

ON PETITION TO SUBSTITUTE ANOTHER AS
PARTY APPELLEE.

JORDAN, J.—Appellant, among the errors assigned in this appeal, called in question, first, the sufficiency of the com-

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plaint upon demurrer. We sustained this contention, and adjudged, under the facts alleged in the complaint, that appellee could not maintain this action for the reason that the right of action, if any existed, was lodged, under the statute, in the surviving widow of the deceased and not in his administrator. For insufficiency of the complaint in this respect, the judgment recovered by appellee below was reversed and the cause remanded to the lower court.

Within the sixty days allowed for a petition for rehearing, Josephine Poneleit, widow of appellee's decedent, presented a petition to this court whereby she prays to be substituted as a party appellee in this appeal in the place of the administrator, the original and sole plaintiff below and sole appellee in this appeal; and she further prays that such proceedings thereafter be had that the judgment heretofore reversed be affirmed in her favor and for her benefit. The administrator also appears and joins in the prayer of the petitioner and declares in his application that he waives any rights which he may have in the case.

Counsel for the petitioner insists that she ought to be substituted as appellee for the following reasons: "(1) Because there is no substantial reason why such relief should not be granted; (2) because the granting of the relief will result in substantial justice; (3) because the cause of action has been well pleaded and amply established by proof, and the decedent's family have been in court from the beginning as the real parties in interest; (4) because the judgment will operate as a bar to any subsequent action growing out of the same matter; (5) because the defense that has been waged to the action is purely technical, in nowise affecting the merits of the action; (6) because it is the intent and policy of the law that the family of one whose death has been caused by the wrongful act or omission of another shall be compensated in damages for the loss, and that justice in this respect shall be administered 'speedily, and without delay'; (7) because no good purpose

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can be served by putting these helpless people to the toil, delay, and needless expense of getting together again the witnesses and going over anew the same trial, against the same defendant, when the court can see from the record that the only injustice that has been done has been in giving too small a verdict."

It is argued that if the widow is entitled to prosecute the action provided by the coal mining statute in controversy, then, under such circumstances, there can be no sufficient reasons urged by appellant in this action why she ought not to have the benefit of the judgment already rendered in favor of the original plaintiff, without being subjected to any further proceedings upon her part in the lower court. Or, in other words, it is contended in effect, that this court ought to vacate the judgment of reversal, permit the original appellee to be supplanted by the widow of his decedent, and then allow her, in her own proper person, to defend this appeal in like manner as though she had recovered as plaintiff below, and had been made the original appellee in the appeal.

Aside from the bare assertions of her counsel, we are cited to no authority whatever to support this unique or novel feature in appellate procedure. Even though it could be conceded that the petitioner at any time had the right to be substituted as appellee, in the place of the administrator, after the cause had been docketed in this court, she certainly would be required to make her application for substitution in due season and not delay until after the judgment had been reversed and the cause remanded.

This court has no original but only appellate jurisdiction in actions of the character upon which this appeal is based, and it is authorized to hear and determine such causes only upon the record as it has been made in the trial court when certified up by its clerk. The petitioner, however, seeks to have this court in effect make a new and different record, from that originally certified in the lower court, by sub-

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stituting as plaintiff below and appellee here a new and entirely different person. If, under the circumstances, such procedure could be sustained, it would follow that whenever it was disclosed to this court, in the appeal of a cause, that the party who had successfully waged the contest below had no warrant under the law to maintain the action, for the reason that the right to do so was lodged in another and different person, then the party who had been mistaken in respect to his rights might be permitted to withdraw and the party authorized to maintain the action in the lower court be substituted in his stead as a party for the first time in this court and be allowed to occupy the same position and exercise the same rights as though he had been originally a party to the action. That such practice is not authorized under our appellate procedure certainly can not be controverted.

While we regret the delay, inconvenience, and expense to which, as it is so earnestly insisted, the petitioner will be subjected in her endeavor to recover damages of appellant for the loss of her husband, in the event we deny her petition, still we as a court must be controlled in this case as in others by the well settled rules of the law, and we possess no authority to waive them on behalf of the petitioner but are compelled to enforce them against her in like manner as any other person.

The petition to substitute is therefore overruled at the cost of the petitioner.

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[No. 19,299. Filed June 20, 1900.]

RAPE.—Assault and Battery.—Evidence.—Intent.—In a prosecution for an assault and battery upon a girl under the age of consent, with intent to commit rape, it was shown that defendant, a man of mature years, and of bad moral character, followed after the girl on two or three occasions as she went into the country on errands, and on one of these occasions asked her when he could see her;

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that he afterward followed her into a barn, took hold of her, felt her breasts and limbs, tried to raise her clothes and throw her down, and when she tried to get away told her that he would not hurt her, and told her she was the sweetest little girl in town, and to wait a minute. *Held*, that the evidence was sufficient to support a verdict finding defendant guilty of an assault and battery with intent to commit rape. *pp.* 114-117.

RAPE.—Intent.—Evidence.—Reasonable Doubt.—Where defendant dominated by libidinous passion met a girl under the age of consent with whom he had been seeking interviews, and, in the seclusion of a barn, took indecent liberties with her person in the prosecution of the arts of the seducer, the fact that he did not accomplish sexual intercourse, or employ greater force, is not inconsistent with a design to win her by lustful blandishments, and that he failed in the latter course does not disprove his criminal intent, nor raise a reasonable doubt as to his intention. *pp.* 116, 117.

SAME.—Evidence.—Instructions.—In a prosecution for an assault and battery with intent to commit rape it was shown that defendant, a man of lecherous disposition, met the prosecuting witness in a barn and took indecent liberties with her person; that he had been following the girl about for several days, attempted to make arrangements to see her privately, and had on a previous occasion met her in the barn. *Held*, that such facts reasonably tended to prove cohabitation, and were sufficient to warrant an instruction that if the jury believed from the evidence that defendant had sexual intercourse with the prosecuting witness the State's case would be made out, although the defendant denied that he had sexual intercourse with the prosecuting witness, and the evidence of the prosecuting witness was equivalent to a denial thereof. *pp.* 117-119.

SAME.—Instructions.—Intent.—An instruction in a prosecution for assault and battery with intent to commit rape that if the jury were satisfied beyond a reasonable doubt that the defendant took hold of the prosecuting witness, it was for them to say whether or not, under all the circumstances, the intention to have intercourse with the girl was then in his mind, and that it was with that purpose, and with that intention in his mind that he laid hands upon her, is not erroneous as suggesting that any particular facts would warrant a particular inference. *pp.* 119, 120.

SAME.—Assault and Battery.—Consent.—Any touching of the person of a female child under the age of fourteen years with intent to perpetrate upon her the act of sexual intercourse, whether forcibly and against her will, or with the voluntary submission of the child, constitutes an assault and battery within the meaning of the statute, since the child can give no consent that would make the act lawful. *p.* 120.

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From the Warren Circuit Court. *Affirmed.*

James McCabe, for appellant.

W. L. Taylor, Attorney-General, *C. V. McAdams*, *Merrill Moores* and *C. C. Hadley*, for State.

HADLEY, J.—The appellant was convicted of an assault and battery upon the prosecutrix, who was a girl under the age of consent, with intent to commit rape. The questions presented by the assignment of errors, and not waived, arise under the overruling of appellant's motion for a new trial.

It is first insisted that the conviction is not sustained by sufficient evidence, in this, that the evidence does not rise to that degree of certainty, with respect to his felonious intent, which excludes every reasonable hypothesis consistent with his innocence. There is no dispute about the law as it is clearly stated in *Cavender v. State*, 126 Ind. 47; but the contention is that the evidence is not so conclusive in character as to preclude a reasonable inference of innocent intent.

The evidence sufficiently proves that the prosecutrix was thirteen years of age, and lived with her grandparents, who were old and feeble. The defendant was fifty-nine years of age, of bad moral character, separated from his wife, and on two or three occasions followed after the girl as she went a short distance into the country on errands, and upon one of these occasions asked her, while she was in the presence of another girl, when he could see her. The defendant was seen at dusk in an alley near a barn on the premises where the prosecutrix lived. On July 13, 1899, he was by a neighbor seen to enter this barn and the girl soon afterward was also seen to go from the house into the barn. About ten minutes later the neighbor, who had observed them, went down the alley to the barn, and looked through a crack into the interior, but saw or heard no one. Passing on he soon returned to his house whence he had made his first observations, and in fifteen or twenty

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minutes the girl reappeared at her house and the defendant left the barn. On July 17th, two witnesses who reside in the neighborhood of the girl, one of whom was her relative, observed the defendant leave his place in the street and go after the girl as if following her. These two men left their office and going to their homes saw the defendant first and the girl shortly afterward go into the barn. The relative at once proceeded to the barn, vainly tried to pull open a door, saw the girl jump from the ladder leading into the mow, hurried to another door on the other side of the building, and there found the girl had escaped and was fleeing to the house and refused to stop upon his call. The witness proceeded into the stable and found the defendant in the mow and put him under arrest.

With respect to the meeting in the stable on July 13th, the girl testified in substance as follows: "I went in at the east door of the barn to get cobs, set my basket on the ground, and while I was getting cobs out of the manger with both hands, Hanes from behind grabbed me by the left arm and said, 'Just wait a minute. I won't hurt you.' He then felt my breasts and my limbs and tried to raise my clothes and tried to throw me down. I stood with my back to him and held onto the manger. He tried to throw me down but didn't try with very much force. He took hold of both my arms with both his hands but I held onto the manger. He then let loose of one hand and took hold of my clothes at the side and raised them a little above my knees, and I just kind of pulled them down. He kind of hurt me when he grabbed my arm. He kind of put his face to mine and said four or five times he would not hurt me and told me I was the sweetest little girl in town and to wait a minute. I don't remember anything else he said and I jerked away from him and went into the house. There was nobody at the house but my grandpa and I did not tell him what had happened and I didn't tell my grandmother until after Hanes was arrested", which was on July 17th.

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With respect to his presence in the barn on the 13th and 17th of July, the defendant, in substance, testified that he was there on both occasions to meet other women; on the 13th to meet the mother of the girl, and on the 17th another woman living two squares away, and without any appointment with either woman. And it appeared from the evidence that the mother of the girl had not been in the town since the previous March. That on both occasions while in the barn, as defendant stated, he saw the girl leave the house and to avoid her seeing him he each time went up into the mow, and did not see nor speak to her in the barn on either occasion.

Intent is a mental function, and, where not consummated, it is impossible to know with absolute certainty what was operating in the actor's mind, and in such cases it must be arrived at by courts and juries from a consideration of the conduct and the natural and usual sequence to which such conduct logically and reasonably points. Appellant's counsel does not inform us of any intent of his client that appears consistent with his innocence. It is, however, contended that the fact that he did not accomplish sexual intercourse, or employ greater force, should be accepted as sufficient evidence that he did not intend it. This contention by no means reaches the question. We think it is apparent that he did not intend to subject the prosecuting witness to his will by force, but if his purpose was to gain her voluntary submission by a course of lascivious conduct towards her, he was none the less guilty. The evidence is that she pulled away from him and went to the house. That he did not employ his power to hold her and coerce her as he might is not inconsistent with a design to win her by lustful blandishments, and that he failed in the latter course by no means disproves his criminal intent, or of itself raises a reasonable doubt. The girl had no power to consent, and her voluntary submission to him would have been as much his crime as her forceable subjection.

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We have no positive evidence of the appellant's intent, and, as in most criminal cases, it must be inferred from the facts proved. The evidence shows that the appellant is a confessed libertine, living apart from his wife; that he had followed the prosecutrix to the country on two or three occasions, and upon one of them, in the presence of another, had requested an appointment with her. According to his own statement he was so swayed by his libidinous passion as to be twice led to the barn, without any appointment, but in the mere hope of an opportunity for gratification. While thus dominated by lecherous desire he met the girl he had followed, and with whom he had been seeking interviews. He at once laid hands upon her in the seclusion of the barn, and commenced a prosecution of the arts of the seducer. This he continued until she tore away and left him. His character, his conduct, his evident frame of mind, the place, the nature of his words and the indecent liberties taken of the person of the girl fully warranted the jury in finding a guilty intent to be the only rational conclusion.

The tenth and eleventh instructions given to the jury are complained of. By the eleventh, the court, in substance, advised the jury that if, after considering all the evidence, they should be satisfied that the defendant did actually have intercourse with the prosecuting witness on the occasion upon which the State claims the crime took place, the State's case would be made out; that it would not defeat the State's case that the jury should be satisfied that the crime actually took place, because included in the crime of rape is the crime of assault and battery with intent to commit a rape. The tenth instruction is to the same effect. That the law is correctly stated in these instructions, see *Polson v. State*, 137 Ind. 519.

But it is insisted that the instructions were erroneous because of the entire absence of evidence that the defendant had sexual intercourse with the girl. Instructions

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should be relevant to the issues and pertinent to the evidence, and if an instruction is given concerning a fact or set of facts, to which no evidence has been adduced, it will be reversible error unless it clearly appears that the party affected was not harmed thereby. *Reed v. State*, 141 Ind. 116, 122; *Pelley v. Wills*, 141 Ind. 688; *Robinson v. State*, 152 Ind. 304.

But we are unable to grant that there was no evidence before the jury tending to prove sexual intercourse. There was no direct evidence of that fact and a positive denial by appellant and evidence equivalent to a denial by the prosecuting witness. But the State was not bound by the testimony of the prosecutrix. While the State could not impeach its own witness, nor contradict her by other witnesses for the purpose of discrediting her testimony, yet it was undoubtedly competent for the State to prove by other evidence the existence of a fact denied by its witness, even though such other evidence had the effect of discrediting the witness. *Rapalje on Witnesses*, §214; 1 *Greenleaf on Ev.* (13th ed.), §443; *Rockwood v. Poundstone*, 38 Ill. 199; *Thorn v. Moore*, 21 Iowa 285, 290; *Cronan v. Roberts*, 65 Ga. 678; *Brown v. Osgood*, 25 Me. 505, 510; *Brolley v. Lapham*, 79 Mass. 294, 297; *Olmstead v. Bank*, 32 Conn. 278, 287; *Brown v. Wood*, 19 Mo. 475; *Seary v. Dearborn*, 19 N. H. 351, 355; *Skellinger v. Howell*, 8 N. J. L. 383; *Thompson v. Blanchard*, 4 N. Y. 303, 311; *Hunter v. Wetsell*, 84 N. Y. 549, 556.

Here the evidence tended to show that the defendant had for several days been following the girl about as if his purposes were meeting with encouragement. He was of lecherous disposition as shown from his own testimony. The jury had a right to believe that the meeting of the two at the barn on the 13th and 17th of July was by appointment, and the right further to believe that they remained together undisturbed in the mow of the barn for fifteen or twenty

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minutes on July 13th, the date upon which the crime is charged. It is not material that we decide, and we do not decide, that the inference arising from such facts, if satisfactorily established, would be sufficient to sustain a conviction for rape, but such facts gave color and reasonably tended to prove cohabitation, and were sufficient to authorize the instruction of which appellant complains. *Reed v. State*, 141 Ind. 116, 122.

Complaint is also made of instruction thirteen. By it the court informed the jury in substance that the law justified them in concluding that a man intends the natural and reasonable consequences of his own acts. However, it was solely a question for them to say whether or not an intention to do a particular thing is proper to be drawn from a particular act shown, and if they should be satisfied from the evidence, beyond a reasonable doubt, that the defendant did take hold of the prosecuting witness, it was for them to say whether or not, under all the circumstances, the intention to have intercourse with the girl was then in his mind, and that it was with that purpose and with that intention in his mind that he laid his hands upon her, remembering all the time that they were the judges of the fact; that it was for them to say whether or not that fact did exist in the case; and that it was for them to say, if it did exist, what the proper inference to be drawn from it was, remembering all the time that all reasonable doubts arising in the case were to be resolved in favor of the defendant.

We are unable to see any infirmity in this instruction of which appellant can complain. It very clearly advised the jury that, whether an inference to do a particular thing may be properly drawn from a particular act shown was solely a question for them to determine, and if they found, beyond a reasonable doubt, that the defendant laid hands upon the girl, it was then *for them to say*, from all the circumstances, whether the intent to have intercourse with the girl was then in his mind, that is, when he laid hands upon her, and whether it was with that purpose and with that

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intention that he did lay hands upon her. We fail to perceive in the language used a suggestion anywhere that any particular facts will warrant a particular inference. And this is the only argument against it.

Appellant also challenges that part of the tenth instruction which follows: "And if the State has satisfied you beyond a reasonable doubt that the defendant either had sexual intercourse with this prosecuting witness, or that he laid his hands upon her with the intent and purpose of having sexual intercourse with her, and that she was under fourteen years of age, they have made out a case." The point of insistence is that, "there can be no assault and battery where it is perpetrated with the consent of the person assaulted."

Section 1990 Burns 1894, §1917 Horner 1897, reads as follows: "Whoever unlawfully has carnal knowledge of a woman forceably against her will, or a female child under fourteen years of age, is guilty of rape, and upon conviction thereof," etc. When perpetrated against a female child under fourteen years of age, consent or nonconsent forms no element of the crime. The crime is the same whether committed forceably and against the will or with the voluntary submission of the child. In either case it is a felony. Furthermore, any touching of the person of a female child under the age of fourteen years, with intent to perpetrate upon her the act of sexual intercourse, is, and necessarily must be, in legal contemplation, without her consent, for she can give no consent that will make the act lawful. Hence any indecent liberties taken of the person of the child, in the prosecution of that intent and purpose, is unlawful, and rude and insolent, to say the least of it, and clearly within the definition of assault and battery.

This court has heretofore decided this question adversely to appellant in *Murphy v. State*, 120 Ind. 115, and with the ruling in that case we are fully content. We find no error in the record.

Judgment affirmed.

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BLUE v. BEACH ET AL.

[No. 18,004. Filed Feb. 1, 1900. Rehearing denied June 20, 1900.]

HEALTH.—State Board of Health.—Power to adopt Rules of Health.

—*Police Power.—Constitutional Law.*—Section 6711 *et seq.* Burns 1894 authorizing and empowering the State board of health to adopt rules and by-laws to prevent the spread of contagious and infectious diseases is not a delegation of legislative authority in violation of article 4, §1 of the Constitution vesting the legislative authority of the State in the General Assembly. *pp. 127-134.*

SAME.—Boards of Health.—Schools.—Vaccination of School Children.

—Under the provision of §6718 Burns 1894 making it the duty of local boards of health to protect the public health and arrest the spread of contagious diseases, a local board of health may require that school children be vaccinated as a sanitary condition imposed upon their privilege of attending school during a period of threatened epidemic of smallpox. *pp. 127-142.*

From the Vigo Circuit Court. *Affirmed.*

S. C. Stimson, H. A. Condit, R. B. Stimson and A. M. Higgins, for appellant.

W. L. Taylor, Attorney-General, *W. A. Ketcham* and *Merrill Moores*, for appellees.

JORDAN, J.—Appellant, Frank D. Blue, instituted this action to enjoin the appellees, Fannie M. Beach and Orville E. Connor, the former being a teacher and the latter superintendent of a graded public school in the city of Terre Haute, from excluding his son, Kleo Blue, from attending said school.

The complaint, *inter alia*, discloses that appellant, plaintiff below, is a resident taxpayer of the city of Terre Haute, Vigo county, Indiana, and is the father of said Kleo Blue, and that the latter is a well and healthy child, between the ages of six and twenty-one years, unmarried, residing with his father in the school district wherein the school of which appellees are in charge is situated. The complaint further charges that the defendants have excluded said Kleo from

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the said public school, and are threatening to prevent his further attendance as a pupil therein.

Appellees filed an answer in three paragraphs, the first being a general denial, which subsequently was withdrawn. By the second paragraph they sought to justify the act of which appellant complained, upon the facts therein alleged and set forth, that there was an exposure to and danger of an epidemic of the disease of smallpox within the limits of the city of Terre Haute and that the board of health of the State of Indiana had, in 1891, in pursuance to law, made, adopted, and published a certain rule or by-law, numbered eleven, and, further, that the legally organized and constituted board of health of said city had made and adopted a certain order. The latter, together with the above mentioned rule of the State board of health, is incorporated in and made a part of the answer.

It is then further alleged that, in pursuance to and in accordance with said order of the local board of health, the secretary thereof had notified and directed the board of school trustees of said city, together with the superintendent of its public schools, not to allow or permit any person whatever to attend such schools unless he or she had been vaccinated. In pursuance of said order of the board of health and the notice given by said health officer, said superintendent of schools directed appellees not to allow or permit any person whatever to attend the public school mentioned in the complaint unless such person had been vaccinated. In pursuance of such order and directions, appellees notified appellant, and also notified his son, Kleo Blue, that, unless the latter was vaccinated, he would not be permitted to attend said school as a pupil. Appellant failed and refused to have his son vaccinated, and the son also refused to be vaccinated: and, by reason of the order and directions aforesaid, it is alleged that appellees refused to permit him to attend said school.

The third paragraph of the answer is substantially the

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same as the second except that it sets out and incorporates therein an ordinance of the city of Terre Haute, adopted in 1881, whereby the board of health of said city was created, and invested with certain specified powers. Rule eleven of the State board of health, in force at and prior to the time of the order made by the local health board, and made a part of the answer, is as follows: "In all cases where an exposure to smallpox is threatened, it shall be the duty of the board of health, within whose jurisdiction such exposure shall have occurred, or danger of such an epidemic ensuing, to compel a vaccination or revaccination of all exposed persons. All vaccinations must be made with non-humanized virus. The only exception to this rule that is recognized by this board is in the event that smallpox is prevalent in epidemic form, and the health officer should certify to the impossibility of obtaining such virus in sufficient quantity, and also as to the purity of the humanized virus to be used in lieu of the bovine virus."

The order made by the local board of health, and made a part of the answer, is as follows: "Whereas, there has been and is an exposure to and a danger of an epidemic of smallpox within the city limits of the city of Terre Haute, Indiana; and "whereas, vaccination is the only preventive of of the disease of smallpox, and the only preventive of the same becoming an epidemic; and whereas, it is dangerous to allow and permit persons to attend the public schools within the limits of said city without being vaccinated; therefore, be it adjudged, decreed and ordered, that there has been and is an exposure to and danger of an epidemic of smallpox within the limits of said city of Terre Haute, and that it is dangerous and would cause an exposure to and an epidemic of smallpox in said city to allow and permit persons to attend public schools within said city without being vaccinated, therefore no persons shall be allowed or permitted to attend any public school within the limits of said

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city without first being vaccinated according to law; and be it further ordered, that the secretary of this board notify the board of school trustees and the superintendent of the public schools of this order and judgment."

The ordinance, pertaining to the board of health, adopted by the common council of the city of Terre Haute in December, 1881, which, as previously stated, was made a part of the third paragraph of the answer, among other things, provides as follows: "The board of health, hereby established, shall have general supervision of the sanitary condition of the city, and is hereby invested with power to establish and enforce such rules and regulations as they may deem necessary to promote, preserve, and secure the health of the city, and to prevent the introduction and spreading of contagious, infectious or pestilential diseases."

A demurrer was overruled to each paragraph of the answer, and plaintiff replied in seven paragraphs, the first of which is a general denial. The second paragraph of the reply set out several rules adopted by the State board of health. The fourth alleged that the local board of health, in addition to the order mentioned in the answer, had, by another rule, excepted all children from said order who presented a certificate from a physician to the effect that they were in feeble health, or were subject to scrofulous or other blood diseases. The sixth paragraph merely averred that a local board of health had been organized under an ordinance adopted by the city of Terre Haute by virtue of the provisions of the general law of the State of Indiana.

By the third paragraph of reply it was sought to show that, at the time plaintiff's son was excluded from the school in question, the danger of an epidemic of smallpox in the city of Terre Haute had passed away. By the fifth paragraph it is averred that there had been no exposure to smallpox in the city of Terre Haute, and that but one case had been reported as existing in the State, which was at

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the city of Muncie. By the seventh paragraph plaintiff alleged and sought to show that vaccination in all cases produced a loathsome constitutional disease which poisoned the blood of the patient, and frequently resulted in death, and that vaccination was not a preventive of smallpox.

A demurrer was sustained to the second, fourth, and sixth paragraphs of the reply, and overruled as to the third, fifth, and seventh. Upon the issues joined, there was a trial by the court which resulted in a judgment in favor of appellees.

The evidence is not in the record, and appellant seeks a reversal of the judgment below upon the ruling of the court in holding the answer sufficient upon demurrer, and in sustaining the demurrer to the second, fourth, and sixth paragraphs of reply.

The contention of appellant's learned counsel is that each paragraph of the answer is bad, and that the facts and matters therein disclosed will not justify the appellees in excluding appellant's son from the public schools. Their insistence may be said to embrace the following propositions:

(1) The exclusion of a pupil from the public schools of this State who is "well and healthy", as the complaint discloses was the condition of Kleo Blue, and where there has been no exposure to the infection of smallpox, can not be sustained merely because such pupil refuses to be vaccinated.

(2) The right of appellant's son, under the facts shown by the complaint, to attend the public school in question is guaranteed by the Constitution, and the qualifications necessary to the exercise of this privilege are prescribed by statute, and, as there is no statute providing that vaccination of a pupil shall become a condition precedent to this privilege, hence it is contended that the order made by the local board of health was without authority of law.

(3) It is further insisted that rules or by-laws adopted by the State board and local boards of health do not have

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the force of laws within their respective jurisdiction, and that the power of the State board to adopt a by-law, or rule, of the nature of rule eleven, is legislative; therefore, under article 4, §1 of the State Constitution, whereby all legislative authority is lodged in the General Assembly, the power to make such rules can not be delegated by it to boards of health.

Appellant in the course of his argument strenuously insists that vaccination is in no manner a preventive of smallpox, and that its failure in this respect is, as he contends, now conceded by many eminent medical authorities. In the objections which he urges against vaccination he, to an extent, at least, proceeds upon the assumption that the person who is subjected thereto will thereby have his system so poisoned by the vaccine virus as to result in his permanent injury. It is true that bad results may, and possibly do, follow from the use of impure virus, or when the system of the patient is itself in a diseased condition, but that such are the results in all cases where pure virus is used, and proper care and skill are exercised, is certainly nothing more than mere assumption. With equal force might it be asserted that, in all cases of the amputation of a limb, by a skilful and experienced surgeon, the death of the patient will necessarily follow as a result of the operation. We may say, however, in answer to the contention of appellant upon this feature of the case, that our decision herein does not in any manner, under the circumstances, depend upon the proposition that vaccination is a preventive of smallpox.

In addition to the arguments advanced by appellant, we have been fully supplied, during the pendency of this appeal, with many circulars and other documents denying the efficacy of vaccination. With the wisdom or policy of vaccination, or as to whether it is or is not a preventive of the disease of smallpox, courts, in the decision of cases like the one at bar, have no concern. It is a question, it is true,

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about which eminent medical men differ, a large majority of whom, however, affirm that it serves as a preventive of, or a protection against, this dread scourge, which Macaulay denominated "the most terrible of all ministers of death". The question is one which the legislature or boards of health, in the exercise of the powers conferred upon them, must in the first instance determine, as the law affords no means for the question to be subjected to a judicial inquiry or determination. Consequently, in our holding in this appeal, it can not be said that we affirm the arguments of those who believe in the efficacy of vaccination, or that we deny the arguments of those who assert that it is a failure and an outrage upon personal liberty.

With this statement we pass to the consideration of the real question involved. There is no express statute in this State making vaccination compulsory, nor imposing it as a condition upon the privilege of children attending our public schools, and, in the absence of such a law, the act of appellee in excluding Kleo Blue from the public schools in question must, under the facts, be justified, if at all, as a public emergency under the rules and order of the respective boards of health as set out in the answer.

In 1891 the legislature of this State passed a statute creating and establishing a State board of health, and investing it with certain powers. See §6711 *et seq.* Burns 1894. By section five of the original act, §6715 Burns 1894, this board is expressly authorized and empowered to adopt "rules and by-laws subject to the provisions of this act, and in harmony with other statutes in relation to the public health, to prevent outbreaks and the spread of contagious and infectious disease." Section 6718 Burns 1894, provides that it shall be the duty of local boards of health to protect the public health by the removal of causes of disease when known, and in all cases to take prompt action to arrest the spread of contagious diseases, to abate and remove nuisances dangerous to the public health, and to perform

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such other duties as may from time to time be required of them by the State board of health, pertaining to the health of the people. By §6719 Burns 1894, it is provided: "It shall be the duty of county boards of health to promulgate and enforce all rules and regulations of the State board of health, in their respective counties, which may be issued from time to time for the preservation of the public health, and for the prevention of epidemic and contagious diseases. And the secretary of any board of health, who shall fail or refuse to promulgate and enforce such rules and regulations, and any person or persons, or the officers of any corporation who shall fail or refuse to obey such rules and regulations, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding \$100, and upon a second conviction the court or jury trying the cause may add imprisonment in the county jail, for any period not exceeding ninety days."

By §6725 Burns 1894, the Governor of the State is empowered to draw a warrant upon the State's treasury, for money in any sum not exceeding \$50,000, to be expended in preventing the introduction into the State, and the spread, of cholera and other contagious and infectious diseases.

Under the general law, by which the city of Terre Haute is governed, the legislature expressly conferred upon its common council the power to establish a board of health, and to invest it with the necessary power to attain its object. This power the common council of that city seems to have exercised by establishing a board of health, under the ordinance of 1881, and investing it with authority to make and enforce such rules and regulations as the board might deem necessary "to promote, preserve, and secure the health of the city, and to prevent the introduction and spreading of contagious, infectious, or pestilential diseases."

Rule eleven of the State board of health, which appears to have been adopted and promulgated in 1891, soon after the organization of that board, provides, as we have seen,

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that in all cases where an exposure to smallpox is threatened, it shall be the duty of the board of health within whose jurisdiction such exposure shall have occurred, or danger of such epidemic ensuing, to compel the vaccination or revaccination of all exposed persons. Pursuant to this rule, and in the exercise of the powers with which it was generally invested, this local board, after expressly finding that there had been and is an exposure to and danger of an epidemic of smallpox within the limits of the city of Terre Haute, made and promulgated the order in controversy, to the effect that no person be allowed to attend the public schools of that city without being vaccinated. In obedience to this order, it appears that the superintendent of the city's public schools directed appellees not to permit any person to attend the school over which they were in charge unless such person had been vaccinated.

That the rule or by-law adopted by the State board of health and the order of the local board were each intended to secure and protect the public health, by preventing the spread in its virulent form of the contagious and loathsome disease of smallpox, there certainly can be no doubt. That the preservation of the public health is one of the duties devolving upon the State, as a sovereign power, can not be successfully controverted. In fact, among all of the objects sought to be secured by governmental laws, none is more important than the preservation of the public health; and an imperative obligation rests upon the State, through its proper instrumentalities or agencies, to take all necessary steps to promote this object. This duty finds ample support in the police power which is inherent in the State and one which the latter can not surrender.

In the case of *State v. Gerhardt*, 145 Ind. 439, 33 L. R. A. 313, on page 451 of the opinion, in speaking in reference to the police power, it is said: "The police power of a State is recognized by the courts to be one of wide sweep.

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It is exercised by the State in order to promote the health, safety, comfort, morals, and welfare of the public. The right to exercise this power is said to be inherent in the people in every free government. It is not a grant, derived from or under any written constitution. It is not, however, without limitation, and it can not be invoked so as to invade the fundamental rights of a citizen. As a general proposition, it may be asserted that it is the province of the legislature to decide when the exigency exists for the exercise of this power, but as to what are the subjects which come within it, is evidently a judicial question." See also *Champer v. City of Greencastle*, 138 Ind. 339, 24 L. R. A. 768.

In order to secure and promote the public health, the State creates boards of health as an instrumentality or agency for that purpose, and invests them with the power to adopt ordinances, by-laws, rules, and regulations necessary to secure the objects of their organization. While it is true that the character or nature of such boards is administrative only, still the powers conferred upon them by the legislature, in view of the great public interests confided to them, have always received from the courts a liberal construction, and the right of the legislature to confer upon them the power to make reasonable rules, by-laws, and regulations, is generally recognized by the authorities. *Parker & Worth. on Pub. Health*, §79; 4 *Am. & Eng. Ency. of Law*, 597; *Lake Erie, etc., R. Co. v. James*, 10 Ind. App. 550.

When these boards duly adopt rules or by-laws, by virtue of legislative authority, such rules and by-laws, within the respective jurisdictions, have the force and effect of a law of the legislature, and, like an ordinance or by-law of a municipal corporation, they may be said to be in force by authority of the State. *City of Salem v. Eastern R. Co.*, 98 Mass. 431, 96 Am. Dec. 650; *Board of Health v. Heister*, 37 N. Y. 661; *Gregory v. Mayor, etc.*, 40 N. Y. 273;

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Polinsky v. People, 73 N. Y. 65; *Dingley v. City of Boston*, 100 Mass. 544; *Swindell v. State*, 143 Ind. 153, 168, 35 L. R. A. 50; *People v. Justices, etc.*, 7 Hun 214; Parker & Worth. on Pub. Health, §85; 4 Am. & Eng. Ency. of Law (2nd ed.) 599.

It is true that such rules and by-laws must be reasonable, and boards of health can not enlarge or vary, by the operation of such rules, the powers conferred upon them by the legislature, and any rule or by-law which is in conflict with the State's organic law, or antagonistic to the general law of the State, or opposed to the fundamental principles of justice, or inconsistent with the powers conferred upon such boards, would be invalid. Parker & Worth. on Pub. Health, §86.

As a general proposition, whatever laws or regulations are necessary to protect the public health and secure public comfort is a legislative question, and appropriate measures, intended and calculated to accomplish these ends, are not subject to judicial review. But, nevertheless, such measures or means must have some relation to the end in view, for, under the mere guise of the police power, personal rights and those pertaining to private property will not be permitted to be arbitrarily invaded by the legislative department; and consequently its determination, under such circumstances, is not final, but is open to review by the courts. If the legislature, in the interests of the public health, enacts a law, and thereby interferes with the personal rights of an individual, destroys or impairs his liberty or property, it then, under such circumstances, becomes the duty of the courts to review such legislation, and determine whether it in reality relates to and is appropriate to secure the object in view; and in such an examination the court will look to the substance of the thing involved, and will not be controlled by mere forms. *In re Jacobs*, 98 N. Y. 98; *Weil v. Ricord*, 24 N. J. Eq. 169.

It is affirmed by the authorities as a general proposition

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or rule that no one has a right to do any act which will cause injury to the health of another, or which will disturb his bodily comfort; still, this right of security to health or comfort can not remain absolute in a state of organized society, but is sometimes required to give way to the demands of trade or other vital public interests. Tiedeman's Lim. of Police Powers, §16.

It can not be successfully asserted that the power of boards of health to adopt rules and by-laws subject to the provisions of the law by which they are created, and in harmony with other statutes in relation to the public health, in order that the "outbreak and spread of contagious and infectious diseases" may be prevented, is an improper delegation of legislative authority, and a violation of article 4, §1 of the Constitution. It is true beyond controversy that the legislative department of the State, wherein the Constitution has lodged all legislative authority, will not be permitted to relieve itself of this power by the delegation thereof. It can not confer on any body or person the power to determine what the law shall be, as that power is one which only the legislature, under our Constitution, is authorized to exercise; but this constitutional inhibition can not properly be extended so as to prevent the grant of legislative authority, to some administrative board or other tribunal, to adopt rules, by-laws, or ordinances for the government of or to carry out a particular purpose. It can not be said that every grant of power to executive or administrative boards or officials, involving the exercise of discretion and judgment, must be considered a delegation of legislative authority. While it is necessary that a law, when it comes from the law-making power, should be complete, still there are many matters relating to methods or details which may be, by the legislature, referred to some designated ministerial officer or body. All of such matters fall within the domain of the right of the legislature to authorize an administrative board or body to adopt ordinances,

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rules, by-laws, or regulations in aid of the successful execution of some general statutory provision. Cooley Const. Lim. 114.

The rule in respect to the delegation of legislative power is admirably stated in *Locke's Appeal*, 72 Pa. St. 491, as follows: "Then, the true distinction, I conceive, is this: The legislature can not delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which can not be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."

That the power granted to administrative boards of the nature of boards of health, etc., to adopt rules, by-laws, and regulations reasonably adapted to carry out the purpose or object for which they are created, is not an improper delegation of authority within the meaning of the constitutional inhibition in controversy, is no longer an open question, and is well settled by a long line of authorities. See *Board, etc., v. Spitler*, 13 Ind. 235; *Welch v. Bowen*, 103 Ind. 252; *City of Madison v. Abbott*, 118 Ind. 337; *Farley v. Board, etc.*, 126 Ind. 468; *Eastman v. State*, 109 Ind. 278; *State v. Haworth, Tr.*, 122 Ind. 462, 7 L. R. A. 240; *Cleveland, etc., R. Co. v. Backus*, 133 Ind. 513, 522, 18 L. R. A. 729; *State v. Chicago, etc., R. Co.*, 38 Minn. 281; *State v. Chicago, etc., R. Co.*, 134 U. S. 418; *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 167 U. S. 479, 17 Sup. Ct. 896, 12 L. ed. 243; *Woodruff v. New York, etc., R. Co.*, 59 Conn. 63, 20 Atl. 17; *Storrs v. Pensacola, etc., R. Co.*, 29 Fla. 617, 11 South. 226; *Atlantic Express Co. v. Wilmington, etc., R. Co.*, 111 N. C. 463, 16 S. E. 393, 18 L. R. A. 393; *State v. Hagood*, 30 S. C. 519, 9 S. E. 686, 3 L. R. A. 841; *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. ed. 294.

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It would seem that the power of the boards of health of this State, under the laws relating thereto to make and adopt all reasonable by-laws, rules, and regulations to carry out and effectuate the great interests of the public health confided to them by the legislature, is so well affirmed by the authorities that we may dismiss this feature of appellant's contention without further consideration. In the light of the firmly settled principles of the law to which we have referred, we may proceed, under the facts, to test thereby the acts of appellees in excluding Kleo Blue from school.

Under the ordinance of the city's common council establishing the local board of health, the latter was, as we have seen, invested with power to adopt and enforce such rules and regulations as it might deem necessary to secure, promote, and preserve the public health, and to prevent the spread of contagious and infectious diseases. By the provisions of the statute creating the State board of health, the imperative duty to protect the public health by the removal of causes of diseases when known, and to take prompt action to arrest the spread of contagious diseases, and to perform such other duties as may from time to time be required by the State board, is expressly enjoined upon all local health boards.

It is certainly evident that the health board of the city of Terre Haute, regardless of the rule of the State board, had, under the law, ample power to protect the public health, and to prevent the spread of contagious and infectious diseases, and for such purposes had the right to adopt such appropriate and reasonable means or methods as its judgment dictated. This being true, and an emergency on the account of danger from smallpox having arisen, and the board believing, as we may assume, that the disease would spread through the public schools, and further believing that it could be prevented, or its bad effects lessened, by the means of vaccination, and thereby afford protection to

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the pupils of such schools and the community in general, it would certainly have the right, under the authority with which it was invested by the State, to require, during the continuance of such danger, that no unvaccinated child be allowed to attend the public school; or the board might, under the circumstances, in its discretion, direct that the schools be temporarily closed during such emergency, regardless of whether or not the pupils thereof refused to be vaccinated.

If vaccination was the most effective means of preventing the spread of the disease through the public schools, and this the local board seems to have determined, it then became not only the right but the duty of the board to require that the pupils of such schools be vaccinated as a sanitary condition imposed upon their privilege of attending the schools during the period of the threatened epidemic of smallpox. This power, as previously asserted, under the circumstances, was lodged in the local board of health irrespective of the rule of the State board. The rule or by-law of the latter merely emphasizes what was already the duty of local boards, in their respective jurisdictions, in times of danger of a smallpox epidemic, to enforce vaccination, if that was believed to be the best and most efficient method or means known of arresting or preventing the spread of the disease. That this was the belief of the State board when it adopted its by-law, and also of the local board when it made its rule or order in question, is certainly evident. It is declared in the order of the latter that "vaccination is the only preventive of the disease of smallpox."

The local board did not attempt, under its order, to compel appellant's son to be vaccinated. Under a reasonable interpretation of its order, the board simply gave him the option or choice either to be vaccinated or remain out of school until the danger of smallpox had passed. The facts alleged in the answer show that there had been an exposure

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in the community to smallpox, and that there was danger of an epidemic of that disease within the city of Terre Haute. Evidently then, under these circumstances, prompt action upon the part of the health authorities, in taking steps to arrest or prevent the spread of the disease, was essential. The first step taken by the board, it appears, was to prevent the spread thereof throughout the community by the children who each day assembled at the public schools from all parts of the city.

It is a well recognized fact that our public schools in the past have been the means of spreading contagious diseases throughout an entire community. They have been the source from which diphtheria, scarlet fever, and other contagious diseases have carried distress and death into many families. Surely there can be no substantial argument advanced adverse to the reasonableness of a rule or order of health officials which is intended and calculated to protect, in a time of danger, all school children, and the families of which they form a part, from smallpox or other infectious diseases.

In several of our sister states, laws have been enacted expressly requiring vaccination; some requiring it, however, only as a prerequisite to the privilege of attending the public schools, while others enforce it against all persons. In the case of *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383, the supreme court of that state upheld the constitutional validity of a statute requiring that all children attending the public schools should be vaccinated. In sustaining the act the court, in the course of its opinion, said: "The act referred to is designed to prevent the dissemination of what, notwithstanding all that medical science has done to reduce its severity, still remains a highly contagious and much dreaded disease. While vaccination may not be the best and safest preventive possible, experience and observation, the test of the value of such discoveries, dating from the year 1796, when Jenner disclosed it to the

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world, has proved it to be the best method known to the medical science to lessen the liability to infection with the disease."

In *Bissell v. Davison*, 65 Conn. 183, 32 Atl. 348, 29 L. R. A. 251, the validity of a law, authorizing school trustees to make vaccination a condition upon the privilege of children attending the public schools, was sustained. The court in that appeal said: "The question before us is not whether the legislature ought to have passed such a law; it is simply whether it had the power to pass it. In no proper sense can this statute be said to contravene the provisions of section one of the first article of our state constitution, as claimed by the plaintiff. It may operate to exclude his son from school, but if so it will be because of his failure to comply with what the legislature regards, wisely or unwisely, as a reasonable requirement, enacted in good faith to promote the public welfare."

In *Duffield v. Williamsport School District*, 162 Pa. St. 476, 29 Atl. 742, 25 L. R. A. 152, appellant's minor son had been excluded from the public schools of the city of Williamsport. The expulsion, it appears, was under the authority of an ordinance adopted by the city which provided that "no pupil shall attend the schools of this city except they be vaccinated, or furnish a certificate from a physician that such vaccination has been performed." The school board in that case was notified by the board of health of an epidemic of smallpox prevailing in near-by cities and towns. Upon considering the communication from the board of health, and from the general alarm arising from a case of smallpox in that city, the school board adopted a resolution providing that no pupil should attend the public schools unless he had been vaccinated. The power to exclude appellant's son, under the circumstances in that case, was upheld. The court in passing upon the question there involved, said: "It should be borne in mind that there is no effort to compel vaccination. The

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school board do not claim that they can compel the plaintiff to vaccinate his son. They claim only the right to exclude from the schools those who do not comply with such regulations of the city and the board of directors as have been thought necessary to preserve the public health. It would not be doubted that the directors would have the right to close the schools temporarily during the prevalence of any serious disease of an infectious or contagious character. This would be a refusal of admission to all the children of the district. They might limit the exclusion to children from infected neighborhoods, or families in which one or more of the members was suffering from the disease. For the same reason they may exclude such children as decline to comply with the requirements looking to prevention of the spread of contagion, provided these requirements are not positively unreasonable in their character."

In re Rebenack, 62 Mo. App. 8, the St. Louis board of public schools ordered that all unvaccinated children should be excluded from the public schools of that city. In that case, the charter law, under which the board of public schools was created, provided that the president and directors thereof should have the power "to make all rules, ordinances, and statutes, proper for the government and management of such schools and property, so that the same shall not be inconsistent with the laws of the land." The court in that case held that the school board had the right to require the vaccination of children in attendance at school, and to exclude those therefrom who refused to comply with the order.

In *Morris v. City of Columbus*, 102 Ga. 792, 30 S. E. 850, 42 L. R. A. 175, the supreme court of that state held that the legislature, in the exercise of the police power, may confer upon municipal corporations the authority to make and enforce ordinances requiring all persons, who may be within the limits of such corporations, to submit to vaccination whenever an epidemic of smallpox is existing, or may

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be reasonably apprehended. See, also, *In re Walters*, 32 N. Y. Supp. 322.

In *Parker & Worth. on Pub. Health*, §123, the rule is stated as follows: "It is sometimes provided by law that persons who may have been exposed to contagion, or who came from places believed to be infected, and particularly children attending the public schools, shall submit to vaccination, under the direction of the health authorities. This requirement is a constitutional exercise of the police power of the state, which can be sustained as a precautionary measure in the interest of the public health."

In the case of *Potts v. Breen*, 167 Ill. 67, 47 N. E. 81, 39 L. R. A. 152, it is held, in the absence of an express authority from the legislature, that a rule of the State board of health, requiring the vaccination of children as a prerequisite to their attending the public schools, is unreasonable when smallpox does not exist in the community and there is no reasonable ground to apprehend its appearance. The same doctrine is reaffirmed in the case of *Lawbaugh v. Board of Education*, 177 Ill. 572, 52 N. E. 850.

In the appeal of the *State v. Burdge*, 95 Wis. 390, 70 N. W. 347, 37 L. R. A. 157, it is also affirmed that, in the absence of a statute authorizing compulsory vaccination, or making it a condition to the privilege of attending the public schools, a rule of the State board of health which excludes from the public and other schools all children who do not present a certificate of vaccination is unreasonable, if, at the time of its adoption, there was no smallpox epidemic in the city, and no sufficient cause for the school authorities to believe that the disease would become prevalent in the city where the rule was sought to be enforced. The court in that case, speaking in respect to the powers of health boards, said: "It can not be doubted but that, under appropriate general provisions of law in relation to the prevention and suppression of dangerous and contagious diseases, authority may be conferred by the legislature

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upon the state board of health or local boards to make reasonable rules and regulation for carrying into effect such general provisions, which will be valid, and may be enforced accordingly. The making of such rules and regulations is an administrative function, and not a legislative power, but there must first be some substantive provision of law to be administered and carried into effect. The true test and distinction whether a power is strictly legislative, or whether it is administrative, and merely relates to the execution of the statute law, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law.' The first can not be done. To the latter, no valid objection can be made."

Neither the holding of the supreme court of Illinois nor Wisconsin, in the cases mentioned, can, under the facts, be said to militate against the conclusion which we reach in the case at bar. In fact, there is much asserted in both cases which may be said to be in harmony with our holding herein. We are not called upon, however, to decide whether a rule of either the State board or local board of health can be carried beyond the limits of the facts in this case. Appellant contends that, under the order of the local board, his son was to be permanently expelled from the public schools of the city of Terre Haute, unless he submitted to vaccination. No such unreasonable interpretation can be placed upon the rule or order in question. The order was the offspring, as we have seen, of an emergency arising from a reasonable apprehension upon the board's part that smallpox would become epidemic or prevalent in the city of Terre Haute. The rule or order could not be considered as having any force or effect beyond the existence of that emergency, and Kleo Blue, by virtue of its operation, could only be excluded from school, upon his refusal to be vaccinated, until after the danger of an epidemic of smallpox

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had disappeared. Any other construction than this would render the rule or order absurd, and place the board in the attitude of attempting to usurp authority. Such an interpretation is not authorized when a more reasonable one can be applied.

It is true, as insisted, that the privilege of children in this State to attend the public schools is guaranteed by the Constitution, at least to the extent that tuition shall be free and such schools shall be equally open to all. Article 8 §1 of the Constitution. *Cory v. Carter*, 48 Ind. 327, 17 Am. R. 738. It is equally true, however, that they are frequently denied this privilege by reason of their refusal to submit to the proper rules of school discipline.

There is no express law in this State authorizing the expulsion from school of boisterous or disobedient pupils. That a rule to this effect, upon the part of school officials or teachers, may be enforced, no one will controvert. If expulsion can result from the violation of a rule, the object of which is to promote the morals of the scholars and the efficiency of the school in general, certainly one which is intended and calculated to promote the health of the scholars ought to be sustained.

There is nothing disclosing that appellant's son was in a condition of health which would exempt him from the requirements of this order but, upon the contrary, it was shown that he was "well and healthy". It is said in appellant's brief that there was no investigation upon the part of the health authorities to ascertain whether his son had been exposed to smallpox. It appears, however, that there had been an exposure upon the part of the community, and it would be an absurdity, under such circumstances, to require the health officials, before taking action to prevent the spread of the disease, to investigate in order to determine the degree of exposure to which every person in the community had been subjected. The question as to what is an exposure to smallpox, so as to be affected thereby, is cer-

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tainly one which in the main must be left to the sound discretion or judgment of the health officers.

The supreme court of Massachusetts, in *City of Salem v. Eastern R. Co.*, 98 Mass. 431, 443, in speaking in regard to the right of boards of health to make general orders and enforce them without unnecessary delay, said: "Their action is intended to be prompt and summary. They are clothed with extraordinary powers for the protection of the community from noxious influences affecting life and health, and it is important that their proceedings should be embarrassed or delayed as little as possible by the necessary observance of formalities."

The exclusion of appellant's son was not, as insisted, in the nature of a penalty, neither can the rule or order in question be considered as compelling his vaccination. It, as previously said, was only a prerequisite to his attendance at school during the period of danger.

Owing to the public importance of the questions involved in this case, we have given them much consideration, and perhaps have unnecessarily extended this opinion, but, under the facts, when tested by the firmly settled legal principles, we are constrained to uphold the order of the local board of health of the city of Terre Haute as a valid exercise of power upon its part; and we therefore conclude that appellees were justified in excluding appellant's son from the public school during the continuance of the emergency, or danger from smallpox. It follows, therefore, that the court did not err in overruling the demurrer to each paragraph of the answer, nor in sustaining appellees demurrer to the second, fourth, and sixth paragraphs of the reply.

The judgment is affirmed.

Burget v. Merritt.

BURGET ET AL v. MERRITT ET AL.

[No. 18,816. Filed June 21, 1900.]

155	143
155	206
156	701
156	702

STATUTES.—Husband and Wife.—Childless Second Wife.—Children by Former Marriage.—Deeds.—Sections 2, 3 and 4 of the act of 1889 (Acts 1889 p. 430), relating to conveyances made by children whose father left surviving him a childless second wife, form a complete statute in themselves, and the subject-matter of such sections is clearly expressed in the title thereof. pp. 145, 146.

155	143
168	551

DESCENT AND DISTRIBUTION.—Husband and Wife.—Childless Second Wife.—Children by Former Marriage.—Deeds.—Estoppel.—Under the provisions of §2 of the act of 1889 (Acts 1889 p. 430), children by a former marriage who executed a deed of conveyance during the life of a childless second wife to lands descending from their father, purporting to convey complete fee simple title to the whole tract, except a life estate of the widow in an undivided third thereof, are estopped from claiming title to the one-third interest as the forced heirs of the widow, at her death in 1897, although the deed of conveyance was executed prior to the passage of the act of 1889, and at a time when the law of descent was construed as giving such heirs no present interest in the share of their stepmother in such estate. pp. 143-148.

SAME.—Husband and Wife.—Childless Second Wife.—Children by Former Marriage.—Deeds.—Estoppel.—Impairment of Contracts.—Where children by a former marriage executed a deed of conveyance, during the life of a childless second wife, to lands descending from their father, purporting to convey complete fee simple title thereto, except the life estate of the widow in an undivided one-third, the enforcement of the provisions of §2 of the act of 1889 (Acts 1889 p. 430), enacted subsequently to the execution of the deed, but before the death of the widow, making such deed binding on them when their expectancy was realized, does not amount to an impairment of their contract. pp. 148-150.

From the Clinton Circuit Court. *Affirmed.*

J. Claybaugh and *N. P. Claybaugh*, for appellants.

M. A. Morrison and *S. Merritt*, for appellees.

BAKER, C. J.—In 1882 William Burget died intestate, seized of 160 acres. He left surviving him Harriet Burget, who was his second wife and by whom he had no children,

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and appellants, who are descendants from a former marriage. In 1883 appellants executed to Seager a deed of release and quitclaim for the fee simple title to the whole tract. They sold and intended to convey to Seager the complete title except a life estate of the widow in an undivided third. Seager paid appellants \$6,200, which was the full value of all the land, and he believed that he was acquiring title to the whole except a life estate of the widow in an undivided third. Harriet Burget knew of, consented to, and approved the sale and conveyance. She died in 1897, and shortly after her death appellants began this action in partition to obtain one-third of the land as the "forced heirs" of Harriet Burget. Appellants have not returned nor offered to return any part of the \$6,200. Appellees, who claim through Seager by descent and purchase, filed an answer in which they relied upon the foregoing facts as a complete defense. The only assignment not waived is that the court erred in overruling a demurrer to this answer for want of facts.

In §2487 R. S. 1881 it was provided "That if a man marry a second or other subsequent wife and has by her no children, but has children alive by a previous wife, the land which at his death descends to such wife shall at her death descend to his children". In *Martindale v. Martindale*, 10 Ind. 566, May term 1858, this statute, with that fixing the extent of the widow's and the children's interests, was construed to mean that at the death of the husband and father the second childless wife took a life estate in an undivided third and the children by the former wife two-thirds in fee and a remainder in fee in one-third. Such was the uniform construction in an unbroken line of decisions down to the case of *Utterback v. Terhune*, 75 Ind. 363, May term 1881. But in that case the construction fixed by a quarter century's adjudications was abandoned, and the above quoted curious and anomalous language was held to mean that the second childless wife took one-third in fee,

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that she had no power to alienate the fee if any descendant of the husband from a former marriage was alive at her death, that such descendants were her "forced heirs", that she had no power to disinherit her "forced heirs", that the children acquired no title from their father and had no present interest—an expectancy only—during the life of their stepmother. *Bryan v. Uland*, 101 Ind. 477; *Thorp v. Hanes*, 107 Ind. 324; *Erwin v. Garner*, 108 Ind. 488; *Gwaltney v. Gwaltney*, 119 Ind. 144; *Habig v. Dodge*, 127 Ind. 31; *Haskett v. Maxey*, 134 Ind. 182, 19 L. R. A. 379; *Stephenson v. Boody*, 139 Ind. 60; *Smith v. McClain*, 146 Ind. 77; *Byrum v. Henderson*, 151 Ind. 102; *Thompson v. Henry*, 153 Ind. 56; *Johnson v. Johnson*, 153 Ind. 60. This was the law in force at the time of William Burget's death and appellants' sale and conveyance to Seager. As appellants had only an expectancy in the one-third that descended in fee to Harriet Burget, their sale of that third by deed of release and quitclaim in 1883 would not estop them from asserting in 1897 the title in fee that they would then derive as the "forced heirs" of Harriet Burget, and the answer would be bad, if the deed is to be given only the effect it would have under the foregoing statute and decisions. *Graham v. Graham*, 55 Ind. 23; *Avery v. Akins*, 74 Ind. 283; *Bryan v. Uland*, *supra*; *Haskett v. Maxey*, *supra*.

In 1889 an act was passed, the first section of which undertook to change the rule of descent prescribed in §2487 R. S. 1881. Acts 1889 p. 430. This section has been found to be void, because the change was attempted to be made by amending a prior amendatory act that had been expressly repealed prior to 1889. *Helt v. Helt*, 152 Ind. 142. And the rule of descent prescribed in §2487 R. S. 1881 continued in force until the act of 1899 went into effect. Acts 1899 p. 131. The second and fourth sections of the act of 1889 read as follows: "(2) In all cases where,

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during the life of the second or subsequent childless wife and after the death of the husband, the children of the latter by a former wife have executed or attempted to execute conveyances in fee to all or any part of the lands affected by the life estate, and have received full payment therefor, or where all or any part of such lands have been conveyed for a full consideration by the guardians of any of such children, such conveyances shall, at the death of such second or subsequent childless wife, be held to convey the interest of such children in such lands that would descend to them through such second or subsequent childless wife, and shall estop such children or their heirs from hereafter claiming such interest. (4) The provisions of this act shall not apply in any case where the second childless wife has died and the estate becomes vested in the heirs of the deceased husband." The subject-matter of these sections is clearly expressed in the title: "* * * and an act to render valid conveyances by children, or their guardians, of deceased husbands who have left second or subsequent childless wives surviving them, and also children by former wives surviving them, of real estate that descended to such second or subsequent childless wives from such husbands, under the provisions contained in §2487 of the R. S. of 1881." Section one and the part of the title in reference thereto are not so connected with the remainder of the act as that their fall destroys the entire structure; on the contrary, sections two, three, and four, and the part of the title relating to them, form a complete statute in themselves. *Smith v. McClain*, 146 Ind. 77. And if this statute is applicable to the present case, the answer is good.

Appellants insist that the rights of the parties are to be determined by the law as it stood when they made the deed to Seager; that the act of 1889 was not intended to apply to deeds executed before its passage; that to apply the act to their deed would destroy their vested rights and impair the obligation of their contract expressed in the deed to Seager.

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In *Haskett v. Maxey*, 134 Ind. 182, and *Stephenson v. Boody*, 139 Ind. 60, relied on by appellants, it was held that a quitclaim deed executed by the children of a former wife, prior to the decision of *Utterback v. Terhune*, 75 Ind. 363, and during the lifetime of the second childless wife, was effectual to convey the fee, although such second childless wife died after the date of the *Utterback-Terhune* case and when the children would have been entitled to take as her "forced heirs" if it were not for the deed. In other words, the construction promulgated in *Martindale v. Martindale*, 10 Ind. 566, that the second childless wife took only a life estate and the children by the former marriage a remainder in fee, had become a rule of property, and rights that had become vested under that construction could not lawfully be affected by a change of construction any more than they could by legislation. In those cases, the children, by the law in force at the time of their father's death, became invested at once with a remainder in fee. But the principle that was correctly enunciated in those decisions is inapplicable here, because by the law in force at the time of their father's death appellants did not become invested with any estate in the lands that were cast upon their stepmother, but had a mere expectancy, created by the statute, to inherit from her the fee that she derived from her husband. As expectant heirs of their stepmother, appellants must look for their vested rights to the law in force at the time of her death, not to the law in force when she acquired the property. *Brown v. Critchell*, 110 Ind. 31, 41. During her life, and before appellants' expectancy had ripened into a vested estate, the law-making power had the right to impose such conditions and make such changes in the law of descent as it saw fit. *Noel v. Ewing*, 9 Ind. 37; *Strong v. Clem*, 12 Ind. 37, 74 Am. Dec. 200; *McNeer v. McNeer*, 142 Ill. 388, 19 L. R. A. 256; *Jackson v. Jackson*, 144 Ill. 274; *Lucas v. Sawyer*, 17 Iowa 517; *State v. Squires*, 26 Iowa 340; *Barbour v. Barbour*, 46

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Me. 9; *Hathon v. Lyon*, 2 Mich. 94; *Magee v. Young*, 40 Miss. 164, 90 Am. Dec. 322; *Shell v. Duncan*, 31 S. C. 547, 10 S. E. 330, 5 L. R. A. 821; *Richards v. Bellingham, etc., Co.*, 47 Fed. 854; *Richards v. Bellingham, etc., Co.*, 54 Fed. 209; *Randall v. Kreiger*, 23 Wall. 137, 23 L. ed. 124.

In regard to the claim that the act of 1889 was not intended to apply to deeds made prior to its passage, it is enough to say that a bare reading of the sections and title hereinbefore set forth clearly reveals the legislature's intention to stop all such unconscionable practices as were attempted in this case.

The act does not impair any contract of appellants. In its essential nature, the act is the same as one that would take away the defense of non-compliance with the statute admitting foreign corporations to do business in this State, which appellants might otherwise have interposed in an action by a foreign corporation to recover on a contract made here without license. It is a contradiction in terms to say that the taking away of the means by which a contract may be repudiated or ignored and the providing of a remedy to enforce the contract as the parties made it is an impairment of the obligation of the contract. "A party," says Story, "has no vested right in a rule of law which would give him an inequitable advantage over another; and such rule may therefore be repealed and the advantage thereby taken away. To illustrate this remark: If by law a conveyance should be declared invalid if it wanted the formality of a seal; or a note void if usurious interest was promised by it; or if in any other case, on grounds of public policy, a party should be permitted to avoid his contract entered into intelligently and without fraud, there would be no sound reason for permitting him to claim the protection of the Constitution, if afterwards, on a different view of public policy, the legislature should change the rule, and give effect to his conveyance, note, or other contract, exactly according to the

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original intention. Such infirmities in contracts and conveyances are often cured in this manner, and with entire justice; and the same may also be done with defects in legal proceedings occasioned by mere irregularities." 2 Story on Const. (5th ed.) 703. And so say the courts. *Satterlee v. Matthewson*, 2 Pet. 380, 7 L. ed. 458; *Watson v. Mercer*, 8 Pet. 88, 8 L. ed. 876; *Randall v. Kreiger*, 23 Wall. 137, 23 L. ed. 124; *Ewell v. Daggs*, 108 U. S. 143, 2 Sup. Ct. 408, 27 L. ed. 682; *Gross v. United States, etc., Co.*, 108 U. S. 477, 2 Sup. Ct. 940, 27 L. ed. 795; *William v. Paine*, 169 U. S. 55, 18 Sup. Ct. 279, 42 L. ed. 658; *Rosenplanter v. Provident, etc., Co.*, 91 Fed. 728; *Rosenplanter v. Provident, etc., Soc.*, 96 Fed. 721, 37 C. A. A. 561, 46 L. R. A. 473; *Andrews v. Russell*, 7 Blackf. 474; *Davis v. State Bank*, 7 Ind. 316; *State v. Sickler*, 9 Ind. 67; *McGill v. Doe*, 9 Ind. 306; *Maynes v. Moore*, 16 Ind. 116; *Walpole v. Elliott*, 18 Ind. 258, 81 Am. Dec. 358; *Wood v. Kennedy*, 19 Ind. 68; *Pierce v. Mills*, 21 Ind. 27; *Price v. Huey*, 22 Ind. 18; *Maxey, v. Wise*, 25 Ind. 1; *Webb v. Moore*, 25 Ind. 4; *Perrin v. Lyman's Adm.*, 32 Ind. 16; *Henderson v. State*, 58 Ind. 244; *Sithin v. Board*, 66 Ind. 109; *Taylor v. Stockwell*, 66 Ind. 505; *Cookerly v. Duncan*, 87 Ind. 332; *Muncie Nat. Bank v. Miller*, 91 Ind. 441; *Kelly, Treas., v. State*, 92 Ind. 236; *Bryson v. McCreary*, 102 Ind. 1; *Johnson v. Board, etc.*, 107 Ind. 15; *Rupert v. Martz*, 116 Ind. 72; *Moore v. City of Indianapolis*, 120 Ind. 483; *Dowell v. Talbot Paving Co.*, 138 Ind. 675; *Schneck v. City of Jeffersonville*, 152 Ind. 204; *Green v. Abraham*, 43 Ark. 420; *Johnson v. Richardson*, 44 Ark. 365; *Dentzel v. Waldie*, 30 Cal. 138; *Town of Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 121; *Summer v. Mitchell*, 29 Fla. 179, 10 South. 562, 14 L. R. A. 815, 30 Am. St. 106; *United States, etc., Co. v. Gross*, 93 Ill. 483; *State v. Squires*, 26 Iowa 340; *Tilton v. Swift*, 40 Iowa 78; *Baughner v. Nelson*, 9 Gill (Md.) 299, 52 Am. Dec. 694; *Wildes v. Vanvoorhis*, 15 Gray 139;

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State v. Torinus, 26 Minn. 1, 49 N. W. 259, 37 Am. Rep. 395; *Wistar v. Foster*, 46 Minn. 484, 49 N. W. 247, 24 Am. St. 24; *Mutual, etc., Ins. Co. v. Winne*, 20 Mont. 20, 49 Pac. 446; *State v. City of Newark*, 27 N. J. L. 185; *Baldwin v. City of Newark*, 38 N. J. L. 158; *Syracuse Bank v. Davis*, 16 Barb. 188; *Chandler v. Northrop*, 24 Barb 129; *Curtis v. Leavitt*, 15 N. Y. 1, at pages 228 and 229; *Forbes v. Halsey*, 26 N. Y. 53; *Chestnut v. Shane*, 16 Ohio 599, 47 Am. Dec. 387; *Stanley v. Smith*, 15 Ore. 505, 16 Pac. 174; *Mitchell v. Campbell*, 19 Ore. 198, 24 Pac. 455; *Tate v. Stooltzfoos*, 16 Ser. & R. 35, 14 Am. Dec. 546; *Donley v. City of Pittsburgh*, 147 Pa. St. 348, 23 Atl. 394, 30 Am. St. 738; *Stokes v. Rodman*, 5 R. I. 405; *Shields v. Clifton Hill Land Co.*, 94 Tenn. 123, 28 S. W. 668, 26 L. R. A. 509, 45 Am. St. 700; *Butler v. United States, etc., Assn.*, 97 Tenn. 679, 37 S. W. 385, *Town of Danville v. Pace*, 25 Gratt. (Va.) 1, 18 Am. Rep. 663; *Skelinger v. Smith*, 1 Wash. Ter. 369; *Huffman v. Alderson*, 9 W. Va. 616; *Johnson v. Hill*, 90 Wis. 19, 62 N. W. 930; *Freiberg v. Singer*, 90 Wis. 608, 63 N. W. 754.

Judgment affirmed.

BROWN ET AL. v. ARMFIELD ET AL.

[No. 19,282. Filed June 21, 1900.]

APPEAL AND ERROR.—Record.—Precipe.—Bill of Exceptions.—Certificate.—Where the clerk was directed by precipe to prepare a transcript of the proceedings and of certain papers and motions to be used on appeal to the Supreme Court, without direction to certify any bill of exceptions, a bill of exceptions containing the evidence embraced in the transcript is not properly a part thereof, and is not identified or covered by the clerk's certificate authenticating the papers named in the precipe.

From the Hendricks Circuit Court. *Affirmed.**Thomas J. Cofer* and *L. A. Barnett*, for appellants.*T. S. Adams* and *S. A. Enlow*, for appellees.

155	150
155	800
156	594

155	150
157	513

155	150
165	49

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MONKS, J.—The only error assigned and not waived is that the court erred in overruling appellants' motion for a new trial. All the causes assigned for a new trial depend for their determination upon the evidence.

Appellants (under §661 Burns 1894, §649 R. S. 1881 and Horner 1897) directed the clerk "to prepare and certify full, true, and complete transcript of the proceedings, and of the following papers, to wit, original complaint, third paragraph of complaint as amended, motion to make third paragraph of complaint more specific, demurrers to each paragraph of complaint, answer and cross-complaint, decree and motion for a new trial of this cause, in this cause to be used on appeal to the Supreme Court."

Only such papers and entries as are embraced in the precipe are properly a part of the record on appeal. *Allen v. Gavin*, 130 Ind. 190; *Reid v. Houston*, 49 Ind. 181. The certificate of the clerk to the transcript recites that the same "contains full, true, and complete copies of all the papers ordered transcribed, and entries in said cause." It will be observed that the precipe contains no direction to the clerk to certify any bill of exceptions, and that the certificate of the clerk only authenticates the papers named in the precipe. It is evident, therefore, that what purports to be a bill of exceptions containing the evidence, embraced in the transcript, is not properly a part thereof and is not identified or covered by the clerk's certificate, and cannot therefore be considered by us. *Allen v. Gavin, supra*; *Reid v. Houston, supra*; Ewbank's Manual, §§10, 115.

Finding no available error in the record the judgment is affirmed.

Hadley, J., took no part in the decision of this cause.

Rinkenberger v. Meyer.

RINKENBERGER v. MEYER.

[No. 18,752. Filed April 8, 1900. Rehearing denied June 21, 1900.]

WILLS.—Life Estate.—Power to Sell.—Where testator gave all of his property to his wife during her life, with remainder over in fee to a third person, and directed that his wife should have the right to use and expend so much of his property as should be needful for her support, with power to sell the farm if she desired to do so, such power to sell did not enlarge the life estate into an estate in fee. pp. 152-155.

SAME.—Life Estate.—Power to Sell.—A gift of power to dispose of the whole estate, annexed to an estate for life, with remainder over in fee to a third person, is not void for repugnancy, and confers upon the life tenant plenary power to convey the fee upon the terms of the power granted. p. 154.

SAME.—Life Estate.—Power to Sell.—Deeds.—A testator by the terms of his will gave all of his property to his wife for and during her natural life, with the right to use and expend so much of the property as should be needful for her support, and power to sell the farm, if she desired to do so, with remainder to her niece. *Held*, that a general deed of warranty executed by the wife for a consideration equal to the value of the fee, purporting to convey the fee to such land, constituted a valid conveyance thereof, although the power to convey was not recited in the deed. pp. 155, 156.

EVIDENCE.—Exception.—Offer to Prove.—Appeal and Error.—An offer to prove made after the ruling of the court excluding the testimony comes too late, and such offer forms no basis for an exception, and is not reviewable on appeal. p. 156.

From the Lake Circuit Court. *Affirmed.*

T. J. Wood, for appellant.

T. S. Fancher, for appellee.

HADLEY, C. J.—The will of Conrad Zeilfelder was probated in October, 1847. The only important item of the will follows: "I Conrad Zeilfelder, * * * having entered into the service of the United States during the war with Mexico, and considering the uncertainty of life, do make and ordain this to be my last will and testament. I give, devise, and bequeath all my property which I now have, both real and personal, and all of which I may die

153	152
154	580
155	581
156	152
157	25
157	462
155	152
158	165
155	152
157	117

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possessed of and entitled to from the government of the United States at the time of my decease, to my beloved wife, Elizabeth Zeilfelder, during her natural life, then I bequeath the same property to Margaret Fed, a niece of my said wife now in the county of Lake, whom I have left in the care and guardianship of Hervey Ball, Esquire, to her and hers forever. My will is that my said wife have a right to use and expend so much of the said property as shall be needful for her support; that she may sell the eighty acres of land which I now own in Lake county, if she desires to do so, and what of my property is left at her decease shall go to said Margaret."

The testator died seized of eighty acres of land in Lake county, Indiana. His widow, Elizabeth, in 1849 intermarried with Nicholas Delschneider, and January 8, 1853, joined with her husband in conveying, for full value, without reference to her authority so to do, said eighty acres by general warranty deed to John H. Meyer, who took immediate possession under claim of absolute ownership, and in March, 1867, conveyed the same by warranty deed, for full value, to the appellee, John Meyer, who has since held the possession under claim of absolute ownership. The widow, Elizabeth Delschneider, is still living.

Appellant, who was plaintiff below under her marriage name, is the same person described in the will of Conrad Zeilfelder as Margaret Fed, and she brings this action under §1082 Burns 1894, to quiet her title in remainder in fee to the lands devised by said will. The overruling of appellant's motion for a new trial is the only error assigned.

The question propounded arises upon the evidence, and in substance is whether, under the will of Conrad Zeilfelder, his widow, expressly taking a life estate, had also conferred upon her such power of disposition as would enable her to sell and convey the fee by deed of general warranty.

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We agree with appellant that the rule is that a power of disposition in a devise, coupled with an estate for life, will not generally enlarge the particular estate into a fee. We further approve the contention that the will under consideration did not confer upon Elizabeth Zeilfelder an estate in fee. But the question we have here goes beyond the character of the estate taken by Elizabeth, and challenges her authority under the will to *convey* the fee, not from herself, but from the testator.

The rule is well established that a gift of power to dispose of the whole estate, annexed to an estate for life with remainder over in fee to a third person, is not void for repugnancy, and confers upon the life tenant plenary power to convey the fee upon the terms of the power granted. *Clark v. Middlesworth*, 82 Ind. 240; *Downie v. Buennagel*, 94 Ind. 228, 234; *Silvers v. Canary*, 109 Ind. 267; *Bowser v. Mattler*, 137 Ind. 649, 652; *Mulvane v. Rude*, 146 Ind. 476, 484.

We think it apparent from the will that the testator intended to confer upon his wife the power to sell and convey any portion or all of his estate if she desired. It appears from the face of the will that he was preparing to depart as a soldier to the Mexican war, and, thus confronting the lonely situation in which he was about to place his wife, and the probability of an early death, which, in fact, came, he would, in discharging this most solemn duty of making a final disposition of his property, have the natural inducement of dealing with his wife unstintingly, and particularly as against one who was not a natural object of his bounty. He directed that his wife should have the right to use and expend so much of his property as should be needful for her support, and she should sell the farm if she desired to do so; and what of his property should be left at her decease should go to appellant, his wife's niece.

The power to convey the fee arises by the clearest implication from the words "she may sell" the farm and "what

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of my property shall be left at her decease shall go to said Margaret." In the absence of the power in the wife to convey, the whole would be left at her decease to go to Margaret. It would be a most unnatural act for a husband so situated thus solemnly to limit his wife to actual necessity in favor of one to whom he owed no natural duty. The only reasonable construction of the will, in the light of the surrounding circumstances, is that the testator intended that his wife should make such use of his property as she desired, and what was left at her death, if anything, should go to appellant as the one next entitled to his bounty.

It is also firmly settled in this State that when the donee of a power to sell land possesses also an interest in the subject of the power, a general warranty deed executed by him for a consideration equal to the value of the fee, and professing and evidencing an intention to convey the fee, is a valid execution of the power without actual reference to its source. It is sufficient if the power exists. *South v. South*, 91 Ind. 221, 225, 46 Am. Rep. 591; *Tower v. Hartford*, 115 Ind. 186; *McMillan v. Deering*, 139 Ind. 70, 72; *Silvers v. Canary*, 109 Ind. 267; *Downie v. Buennagel*, 94 Ind. 228.

The deed of Elizabeth Delschneider, the widow, to John H. Meyer to the land mentioned in the will contained the following provision: "The grantors, their heirs and assigns, covenant with the grantee, his heirs and assigns, that the title so conveyed is free, clear, and unencumbered, and that they are lawfully seized of the premises aforesaid, as of a sure and indefeasible estate of inheritance in fee simple, that they will warrant and defend the same against all claims whatsoever."

The evidence shows without contradiction that the consideration received by her was the full value of the whole estate. There can be not the slightest doubt but the widow intended to convey the fee, and just as much certainty that the grantee believed he was receiving the fee. He took possession under the grant, claimed to be the absolute owner,

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and conveyed the same to the appellee by a general warranty deed for full value; and, under the authorities cited, he took an indefeasible title in fee. The finding and judgment of the court was sustained by sufficient evidence.

Complaint is also made of the court's action in denying appellant the right to prove that when the widow, Elizabeth, sold the land to Meyer, she was not in need of it for her support. We quote from the record: "Q. Do you know whether she had any need to sell any land in order to provide for her present or future support? Objected to by counsel for the defendant, and the court sustained the objection; and to this ruling of the court the plaintiff excepted. And thereupon plaintiff offered to prove by the witness, in answer to the question, that * * *. The offer was refused by the court, to which ruling of the court the plaintiff by counsel at the time excepted."

No question is here presented upon the excluded testimony. The offer to prove came too late. To be profitable to the trial judge, or reviewable upon appeal, the offer to prove must be made pending the question, after objection and before the ruling of the court. An offer to prove after the judgment of the court has been pronounced, and when there is no question pending, forms no basis for an exception. *Gunder v. Tibbits*, 153 Ind. 591, and authorities there cited.

Judgment affirmed.

CARNAHAN, TRUSTEE OF WASHINGTON SCHOOL TOWNSHIP OF DAVIESS COUNTY, INDIANA, v. THE STATE, EX REL. EADS ET AL.

[No. 18,889. Filed June 22, 1900.]

SCHOOLS.—*Removal of Schoolhouse.*—The expediency of changing a schoolhouse site is not to be determined by the superintendent alone, under the provisions of the act of 1893 (Acts 1893 p. 17), but with his opinion must concur that of the trustee and a majority of the patrons of the school, and whether the facts exist that warrant

155	156
156	590
155	156
164	303
155	156
166	378
155	156
166	140
155	156
171	292

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the superintendent in ordering a removal is a question that is properly open to judicial investigation. *pp. 157-159.*

QUAERE.—Are not taxpayers of a township who have no children of school age entitled to be enumerated as patrons or voters of a particular school selected by them? Has §15 of the general school law of 1865 (Acts 1865 p. 3) been repealed? *p. 159.*

From the Daviess Circuit Court. *Affirmed.*

W. Hefferman and *E. Mattingly*, for appellant.

M. S. Hastings, *J. G. Allen* and *J. C. Billheimer*, for appellees.

BAKER, C. J.—Relators successfully prosecuted this action for a mandate to require appellant school trustee to maintain a school in schoolhouse number ten of his township as now located. The errors assigned, which are predicated upon the conclusions of law on the facts specially found by the court in reference to defenses in abatement and in bar, and upon the refusal of a new trial, present but one question, and that is the effect of an order made in 1898 by the county school superintendent for the removal of the schoolhouse from its present site.

Prior to the adoption of the act of February 7, 1893 (Acts 1893 p. 17, §§5920a-c Burns 1894), the trustee, if acting in good faith, had an unlimited discretion in regard to the removal of schools, subject only to an appeal to the county superintendent; the patrons or voters of the school district had the right to petition the trustee for or against the removal, but their desires were only advisory to the trustee; and, if they were dissatisfied with the trustee's decision, they could appeal to the county superintendent, who, if acting on the appeal in good faith, exercised an unlimited and final discretion respecting the removal. §§5920, 5986, 6028 Burns 1894, §§4444, 4499, 4537 R. S. 1881 and Horner 1897; *Crist v. Brownsville Tp.*, 10 Ind. 461; *Trager, Tr., v. State*, 21 Ind. 317; *Koontz v. State*, 44 Ind. 323; *Braden v. McNutt, Tr.*, 114 Ind. 214; *Knight, Tr., v. Woods*, 129 Ind. 101; *Hendricks, Tr., v. State*, 151 Ind. 454.

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Under the act of 1893 the change of a schoolhouse site can be effected only by the concurrent desires and action of three parties, (1) a majority of the patrons of the school, (2) the trustee of the school township, and (3) the county superintendent of schools. The wishes of the first two parties are to be expressed by signing and presenting a petition to the county superintendent, and of the third by an order for or against the change. The trustee is required to post notices of the time when the petition will be presented to the superintendent. This is evidently for the benefit of the patrons of the school who do not sign the petition. The act further requires that, before the superintendent expresses his opinion on the propriety of the change by making an order, satisfactory proof shall be made to him that a majority of the patrons are petitioners for the change. The plain purpose of this requirement is to prevent the removal's being made if in fact a majority of the patrons are opposed. *Kessler, Tr., v. State*, 146 Ind. 221.

In this case, seven persons signed the petition that was presented to the superintendent. At the same time, and before the superintendent acted upon the petition, seventeen persons, of whom two had signed the petition, presented to the superintendent their written protest against the change. The superintendent ordered the removal. Appellant insists that this action by the relators is a collateral attack upon a judgment. That the superintendent had the power to determine whether or not the trustee and a majority of the patrons desired the change and had properly expressed their wishes; and that the correctness of the superintendent's action can not be inquired into collaterally. Whether or not the site of a schoolhouse should be changed is purely an administrative question. It is of the same nature now that it was before the act of 1893 was passed. Under the former statute, courts could not direct the trustee or the superintendent to favor or oppose any particular location; and, under the present statute, courts can not control the

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exercise of the administrative judgment involved in the change of a schoolhouse site, in the absence of fraud or clear abuse of discretion. But the expediency of changing the site is not to be determined by the superintendent alone. With his opinion must concur that of the trustee and a majority of the patrons of the school. And it is their expression of a desire of change that is the superintendent's warrant for giving his opinion of the matter at all. Frequently administrative officers are required to determine whether or not certain conditions exist without which they have no authority to act; but such a determination is not a judicial decision. *Wilkins v. State*, 113 Ind. 514, and cases cited on page 519; *Board, etc., v. Davis*, 136 Ind. 503, 22 L. R. A. 515; *Board, etc., v. Heaston*, 144 Ind. 583, 55 Am. St. 192; *Board, etc., v. State*, 147 Ind. 476. If the conditions exist, the action of the administrative officer stands, otherwise not. Though courts can not control the honest exercise of discretion by administrative officers, yet whether or not the facts exist that warrant such exercise of discretion is a question that is properly open to judicial investigation.

The parties devote considerable attention to a discussion of the meaning of the word "patrons" in the act of 1893, but it is unnecessary to proceed with that inquiry. Appellant claims that the "patrons" of the school in question numbered only twelve, of whom seven petitioned for and five protested against the change. But, as two petitioners signed the protest before the superintendent acted, there were only five petitioners and seven objectors. So the status of the other ten who signed the protest is immaterial. But, *quaere*: Are not taxpayers of a township who have no children of school age entitled to be enumerated as patrons or voters of a particular school selected by them? Has section fifteen of the general school law of 1865 (Acts 1865 p. 3), which was omitted from the Davis revision of 1876 and every subsequent revision, been repealed?

Judgment affirmed.

Shrum, Adm., v. Simpson.

SHRUM, ADMINISTRATRIX, ETC., v. SIMPSON.

[No. 19,861. Filed June 22, 1900.]

CONTRACTS.—Partnership.—Farm Contracts.—Landlord and Tenant.—An agreement by which the owner of lands contracts with another that such lands shall be occupied and cultivated by the latter, each party furnishing a certain proportion of the seed, implements, and stock, and that the products shall be divided at the end of a given term, or sold and the proceeds divided, does not create a partnership between the parties. *pp. 160-164.*

ACCOUNTS.—Executors and Administrators.—Complaint.—A complaint disclosing that defendant had in his possession money and property belonging to the estate of decedent to which plaintiff, as administratrix, was entitled, a demand, and the refusal of defendant to account, is sufficient to entitle plaintiff to an accounting. *pp. 164, 165.*

From the Washington Circuit Court. *Reversed.*

J. C. Lawler and J. L. Shrum, for appellant.

H. Morris and M. B. Hottel, for appellee.

DOWLING, J.—Appellant's decedent owned and was in the possession of a farm of 160 acres, in Washington county, Indiana. He entered into a farming contract with the appellee for the term of one year from March 1, 1898. The agreement was by parol. By its provisions, the appellee was to have the possession of the tract for one year from and after March 1, 1898; he was to cultivate the same, the decedent designating what crops should be planted, and in what fields they should be raised; appellee was to have the house, the barn, and the garden plot, and was to pay \$2.50 per month as rent for them; he was to furnish all work, labor, and farming implements, excepting one-half of a mowing machine; also, one-half of all seeds for all crops, excepting timothy seed for meadow, all of which was to be furnished by decedent in case he required the same to be sowed in wheat ground; decedent was to furnish the other half of all seeds. Each crop grown on said lands was to be divided into two equal parts after it was harvested or

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gathered, and one of these parts was to belong to the decedent, and the other to the appellee. Each party was to pay for threshing one-half of the wheat, oats, and timothy seed, and, excepting such parts of said grain and seed as the parties mutually agreed to store for later disposition in the markets, or otherwise, the said grains and seed were to be equally divided at the machine. Neither party was to haul away from said lands any of the hay, corn, straw, fodder, or unthreshed oats, but the same were to be fed to the stock on the said farm. One-half of all live stock was to be furnished by each party, and appellee was to care for and feed the same. Neither party was to create any indebtedness for which the other could be made liable. The decedent was to direct when any of the stock should be sold, and, upon a sale of stock, appellee was to pay to decedent one-half of the amount received therefor. All stock, fowls, hay, grain, and oats, were to be divided share and share alike before March 1, 1899, and, if a division could not be agreed upon in any case, the stock not divided was to be sold, and the proceeds divided before March 1, 1899.

It is alleged in the complaint that the appellee took possession of the land under this agreement, that each party furnished the seed, grain, live stock, and other articles required by its terms, and that appellant's decedent died March 11, 1898. It is further alleged that the appellant and appellee acted upon the agreement after the death of said decedent. It is charged that appellee raised upon said lands, during said term, crops of wheat, oats, hay, corn, and stock, of the value of \$600, a bill of the particulars of which is filed with the complaint; that the appellee sold and disposed of all the stock, grain, fowls, corn, hay, oats, and timothy seed; that appellant has demanded from the appellee one-half of the amounts so received by him, due to said estate, but, that with the exception of one-half of the wheat grown on said lands, the appellee wrongfully retains the same in his possession.

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The second paragraph of the complaint does not differ materially from the first, except that it alleges a demand for an accounting, and a refusal on the part of the appellee to account, and, also, that the money and property belonging to the estate of said decedent, in the hands of the appellee, are required to pay to the widow her statutory allowance of \$500. A demurrer to each paragraph of the complaint was sustained by the court, and judgment was rendered for appellee. These rulings are assigned for error.

The objections taken to each paragraph of the complaint are that it appears from the agreement sued upon that the appellee and the decedent were partners, or, at least, tenants in common of the property on the farm, and that, in either case, one of the parties having died, the appellee, as survivor, is entitled to the possession of the property so held until he has fully settled the business, and that, until such settlement is made, the appellant has no right to sue. 17 Am. & Eng. Ency. of Law, 835; *Powell v. Bennett*, 131 Ind. 465; *McIntosh v. Zaring*, 150 Ind. 301; *Valentine v. Wysor*, 123 Ind. 47, 7 L. R. A. 788; *Thompson v. Lowe*, 111 Ind. 272; *Needham v. Wright*, 140 Ind. 190; *Holmes v. McCray*, 51 Ind. 358, 19 Am. Rep. 735, and *Kenyon v. Williams*, 19 Ind. 44, are referred to as sustaining these objections. Most of these cases decide nothing more than that, where a partnership is shown to exist, one partner cannot maintain an action against another for his share of the partnership assets until the business of the firm has been wound up, the debts paid, and nothing remains to be done but to divide the residue of the partnership property. *Kenyon v. Williams*, *supra*, holds that a partnership may exist in the business of buying and selling real estate. The main question here is, not as to the rights of partners in partnership property, but whether the agreement between the decedent and the appellee created a partnership.

While many definitions of the term *partnership* are given by jurists and courts, and various tests have been pro-

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posed by which its existence may be determined, no general rule on the subject has been, or can be, laid down which will apply to all cases. An author of great and exact learning states the law thus: "In short, the true rule, *ex aequo et bono*, would seem to be that the agreement and intention of the parties themselves should govern in all cases. If they intended a partnership in the capital stock, or in the profits, or in both, then, that the same rule should apply in favor of third persons, even if the agreement were unknown to them. And, on the other hand, if no such partnership were intended between the parties, then, that there should be none as to third persons, unless where the parties had held themselves out as partners to the public, or their conduct operated as a fraud and deceit upon third persons." Story on Partnership, §49. Such intention must, of course, be legally ascertained, and mere declarations of the persons interested and uniting in the prosecution of a common enterprise that no partnership existed, would not be permitted to control the legal effect of acts or proceedings from which the existence of a partnership is by the law presumed.

It is also to be observed that where the rights of third parties are not involved the contract will be liberally construed with reference to the actual understanding of the parties, and the objects they had in view. *Hitchings v. Ellis*, 12 Gray 449.

There are obvious reasons for holding that farm contracts, or agricultural agreements, by which the owner of lands contracts with another that such lands shall be occupied and cultivated by the latter, each party furnishing a certain proportion of the seed, implements, and stock, and that the products shall be divided at the end of a given term, or sold and the proceeds divided, shall not be construed as creating a partnership between the parties. Such agreements are common in this country, are usually very informal in their character, often resting in parol as in the present case. In

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the absence of stipulations or evidence clearly manifesting a contrary purpose, it will not be presumed that the parties to such an agreement intend to assume the important and intricate responsibilities of partners, or to incur the inconveniences and dangers frequently incident to that relation. The parties to such agreements seldom contemplate anything more than a tenancy of the land, with provision for compensation to the landlord from the fidelity, labor, and skill of the tenant. There is no community of interest in the land, which is the principal thing in the agreement, and a division and several ownership of the crops and other products are usually provided for. While the custom of renting farm lands upon shares is general, the courts have seldom held that such agreements create partnerships between the owner of the land and the tenant. A large majority of the cases construe them as creating tenancies only. *Chase v. Barrett*, 4 Paige (N. Y.) 148; *Quackenbush v. Sawyer*, 54 Cal. 439; *Chapman v. Eames*, 67 Me. 452; *Warner v. Abbey*, 112 Mass. 355; *Dixon v. Niccolls*, 39 Ill. 372; *Allwood v. Ruckman*, 21 Ill. 200; *Putnam v. Wise*, 1 Hill (N. Y.) 234, 37 Am. Dec. 309.

The agreement in question relates exclusively to the dealings of the parties with each other, and not with third persons. It distinctly separates their rights in the use and occupation of the land, and in the ownership of its products. Such products and live stock were to be divided *in specie*, except that where a division of the live stock could not be agreed upon it was to be sold, and the amount received therefor divided. No debts were to be contracted by either party for which the other would be liable. Under this agreement, the authority of the appellee to make sales of the live stock was that of an agent, and not that of a partner. Upon a fair construction of the agreement, it is evident that the appellee was the tenant and agent of the decedent, and in no sense a partner.

The complaint disclosed that the appellee had in his

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possession moneys and property belonging to the estate of the decedent to which the appellant, as administratrix, was entitled. The possession by the appellee of such money and property of his landlord, being that of an agent, his failure and refusal to render an account of his dealings, and to make a settlement with the administratrix of the decedent was a fraud upon the rights of the appellant. The situation of the parties and the circumstances set forth in the complaint render a discovery indispensable to establish the appellant's right, the appellee being liable for the amount realized from the sale of the property, if such amount exceeded its market value, or for its market value if it was disposed of by the appellee for a less sum. Upon the face of the complaint no pretext appears for the failure of the appellee to render an account, turn over the property of the decedent to the appellant, and pay into her hands the moneys held by him belonging to the estate. The term of the tenancy has expired, all the crops and live stock have been sold, or are in a condition to be divided, there are no debts to be paid, and nothing remains to be done but to make the settlement.

The judgment is reversed, with instructions to overrule the demurrers to the complaint, and for further proceedings in accordance with this opinion.

THE BOARD OF COMMISSIONERS OF PERRY COUNTY ET
AL. v. GARDNER.

[No. 19,129. Filed June 26, 1900.]

COUNTIES.—*Investigation of County Offices.—Contracts.—Injunction.*

—A contract entered into by a board of county commissioners employing an accountant to investigate the books of the offices of auditor and treasurer is not void because of a stipulation therein that the deputy treasurer, who had been such deputy for eleven years of the period included in the proposed investigation, was to assist in the investigation. p. 168.

155	165
157	110

155	165
168	84

155	165
171	127

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COUNTIES.—*Investigation of County Offices.—Injunction.*—The fact that the books and records of county offices had been examined by other experts, and the accounts audited and corrected, was no reason why a further examination should not be made by the board of commissioners, since such examination was not conclusive. *pp. 168, 169.*

SAME.—*Investigation of County Offices.—Injunction.*—A charge in a complaint to enjoin the enforcement of a contract entered into by the board of county commissioners for the investigation of the records of county offices that the contract price for the labor to be performed by the expert was unreasonable, and more than other competent persons would have asked, is not a sufficient ground for an injunction. *p. 169.*

SAME.—*Limitation of Indebtedness.—Constitutional Law.*—A contract entered into by the board of county commissioners employing an accountant to examine the records of county offices is not rendered void by reason of the fact that the indebtedness of the county was in excess of the constitutional limit, and there was no money in the treasury, not otherwise appropriated, with which to pay the compensation of the expert, where the compensation was payable in instalments, and it was not shown that the county would be unable to pay the same from its current revenues. *pp. 169-172.*

From the Perry Circuit Court. *Reversed.*

Esarey & Ewing, W. A. Land, C. A. Weathers and H. A. Lee, for appellants.

B. K. Elliott, W. F. Elliott, F. L. Littleton, T. W. Lindsey, P. Zoercher, E. C. Henning and William Henning, for appellee.

DOWLING, J.—The board of commissioners of Perry county, in this State, entered into a contract with one Grimes, whereby the latter, in consideration of \$3,300, to be paid to him by said board, agreed to make an investigation of the books, papers, and records of the offices of the auditor and treasurer of said county, for the period between December 1, 1866, and December 1, 1898, and to return to said board a report of such examination, showing the condition of said offices, and whether there was any money due to said county from any source. It was stipulated that one Knight, the then deputy treasurer of said county, should be employed by Grimes to assist him, but that Knight should be paid by Grimes.

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This suit was brought by the appellee, Gardner, a taxpayer of said county, to enjoin the board and the auditor from paying out any part of said consideration, or issuing warrants therefor, Grimes and Knight being joined as defendants. Separate demurrers were filed to the complaint by the defendants below, and to each of the several specifications thereof. These demurrers were overruled. The defendants answered separately, and demurrers to the third and fifth paragraphs of each answer were sustained. The general denial filed by the board and by the defendant, Grimes, being withdrawn, and these parties refusing to plead further, and the auditor and Knight failing to appear, the court rendered judgment on the demurrers to the answers of the board and Grimes, and decreed a perpetual injunction as prayed for in the complaint. The board and Grimes appealed, but the board subsequently dismissed its appeal. The errors assigned are the rulings on the several demurrers.

The complaint consisted of a single paragraph, but stated six separate grounds as the basis of the relief asked for. These several grounds were numbered, and were referred to by both parties as specifications. In addition to a demurrer to the complaint as a whole, a demurrer to each specification was filed.

The first three grounds for the injunction, stated in the complaint, relate to a contract alleged to have been made between the board and Grimes at a time when the board was not legally in session. The sufficiency of these grounds is admitted by the appellant, Grimes, but this is unimportant, for the reason that the remaining specifications of facts admit the execution of another contract in pursuance of an order subsequently made when the board was in session and was engaged in the discharge of its administrative duties.

The facts relied upon by the appellee, and which constituted the ground of the judgment were: (1) That Knight, who was to be employed by Grimes to assist him in his

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labors, was, at the time of the execution of the contract, the acting deputy treasurer of said county; that he had been such deputy treasurer for eleven years of the period included in the proposed investigation, and that he was interested in its result; (2) that the investigation for any part of the period previous to the last six years was useless, because all claims upon the official bonds of officers, to recover moneys embezzled, wrongfully collected or retained by them, or for which they might otherwise have been liable, were barred by the statute of limitations; that as to the twenty years prior to 1892, and as to the twenty years prior to 1887, the investigation would be useless, because experts had already been employed by the Attorney-General and the board, respectively, to examine, audit, and correct the books and records in the offices of the auditor and treasurer; and that the proposed allowance was unreasonable in amount because other experts could be employed who would do the same work for \$1,200; (3) that the county was already indebted beyond the constitutional limit of two *per centum* of the value of the taxable property within its boundaries, the indebtedness incurred under the contract being, therefore, forbidden by law.

The proposition that the contract was void because it contemplated that Knight, the deputy treasurer, should assist Grimes is untenable. His employment as an assistant expert accountant was in no way incompatible with his duties as deputy treasurer. Neither was it objectionable on grounds of public policy. His familiarity with the books and records of the county, and with the methods of transacting the county business, may have rendered his assistance especially valuable and desirable. It is not alleged that he was in any way implicated in any fraud upon the county, or that he had been guilty of, or was privy to, any official irregularity.

Again, the fact that former examinations of the books and records had been made by other experts, and that the ac-

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counts so investigated had been audited and corrected, was no reason why a further examination should not be made. In the opinion of the board, the former investigations might have been collusive, or imperfect, or unsatisfactory. Certainly they were not conclusive upon the board.

The charge that the contract price for the labor to be performed by the expert was unreasonable, and more than other competent persons would have asked, is not a sufficient ground for an injunction. The board had a discretion in the selection of an expert, and it also had the right to determine for itself what would be a reasonable compensation for the work required. It is not averred that any one had offered to perform the labor for a less price, or was ready to do it, or that there was anything fraudulent or collusive in the letting of the contract to Grimes.

The only question remaining is whether the contract was rendered void by the financial condition of the county at the time it was made. The allegations of the complaint are: "That on the 9th day of December, 1898, the aggregate value of the taxable property within said county, according to the last assessment for State and county taxes previous to that day, amounted to \$3,289,215; that on the 9th day of December, 1898, the aggregate indebtedness of Perry county was \$102,145.08, and, therefore, was in excess of two *per centum* on the value of the taxable property within said county; that said contract contemplates, and incurs a liability and indebtedness in said county in the sum of \$3,300, and is therefore null and void.

"That said contract was not entered into in time of war, etc., * * * nor was said contract and expenditure of said \$3,300 necessary to maintain the corporate existence of said Perry county, Indiana, nor was there, on the 9th day of December, 1898, any money in the treasury of said Perry county not otherwise appropriated with which to pay the said sum of \$3,300, nor was there any provision made for the payment of the same, and the said contract is therefore null and void."

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The contract referred to in the complaint provided that the \$3,300 should be paid as the work progressed, at the rate of \$50 on each year investigated, and the residue when the work was completed.

The averments that there was not money in the treasury, not otherwise appropriated, with which to pay the compensation of the expert, and that no provision had been made to pay the same, were insufficient to show that the county would be unable to pay, out of its current revenues, all of its current expenses, as well as the instalments to become due under the contract with the appellant. The amount of its ordinary current expenses was not set out, nor was the amount of its ordinary revenue from taxation shown. From all that appears in the complaint, a sum more than sufficient to pay all current expenses, together with the sum agreed to be paid to the appellant, may have been collectible every year. The fact that there was no money in the treasury on December 9, 1898, with which to pay said claim, was immaterial, as nothing was then due upon it. The averment that no provision had been made to pay the sum to become due does not exclude the possibility that, without special provision for this particular claim, a sufficient amount would be realized from the ordinary current revenues to pay it as it came into existence.

The rule in such cases is correctly stated in *City of Valparaiso v. Gardner*, 97 Ind. 1, where it is said on p. 12: "When the current revenues are sufficient to fully pay the current expenses necessarily incurred to maintain corporate life, there cannot be said to be any debt. We do not assert that a debt may be created even for current expenses, if its effect will be to extend the corporate indebtedness beyond the constitutional limit, but we do assert that where the current revenues are sufficient to defray all current expenses without increasing the indebtedness, there is then no corporate debt incurred for such expenses." *Cason v. City of Lebanon*, 153 Ind. 567; *City of South Bend v. Reynolds*, ante, 70.

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The principle applicable here closely resembles that involved in *City of Logansport v. Dykeman*, 116 Ind. 15.

In that case, a city already indebted beyond the constitutional limit entered into a contract with certain attorneys to effect a compromise and settlement of a large outstanding bonded indebtedness against the city. The consideration to be paid for such services was five per cent. of the reduction of the amount they might secure from the principal and interest of the bonds and coupons. It was claimed by the plaintiffs, in an action to recover the amount due them on that agreement, that the reduction secured by them amounted to \$46,000, and that the city became indebted to them in the sum of \$2,300. The several paragraphs of the answer presented defenses arising under article thirteen of the Constitution, relating to the limitation upon municipal indebtedness. In ruling upon the sufficiency of these answers, the court said by Mitchell, J.: "The answers, in effect, confess these averments in the complaint, but say that the contract to pay five per cent. is within the constitutional inhibition, because the city was already indebted in an amount beyond the limit of the Constitution.

"The contract with the plaintiffs did not contemplate the creation of a new or additional debt. It was a contract for services to be rendered in securing the reduction of an existing debt. Certainly it never was intended that a municipality, whose indebtedness was actually or nominally up to the constitutional limit, might not contract for the services of an agent or attorney to contest the validity of the whole or any part of its indebtedness, and secure a reduction of the amount thereof. To give the Constitution such a construction would effectually tie the hands of municipalities, so to speak, and disable them from entering into any arrangement for refunding or reducing the amount of their preëxisting indebtedness by new promises to pay, or by any arrangement looking to a compromise. *Powell v. City of Madison*, 107 Ind. 106, and cases cited."

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To ascertain from its accounts, books, and records, through the agency of an expert accountant, its financial condition, the true amount and nature of its outstanding indebtedness, the character and amount of allowances made by its board of commissioners, and the sums which may have been wrongfully charged, retained, embezzled, or lost, through the negligence or fraud of its officers, may be, and is, quite as important to a municipal corporation as to obtain a compromise or reduction of liabilities already known to exist. Indeed, such previous investigation is an indispensable preliminary to any measures having for their object the protection of a municipality against imposition and fraud, and the recovery of moneys justly due to it. The statute expressly authorizes such a contract. §7853 Burns 1894; *Duncan v. Board, etc.*, 101 Ind. 403.

If a municipal corporation, which has been robbed by dishonest officials, or impoverished by weak and negligent ones, is disabled by the very situation so created from having a proper examination of its accounts and records made and reported, and from employing counsel, and using other necessary means to prosecute the wrongdoers, or secure an adjustment of its claims, it would be impotent to protect itself against fraud, or to assert and establish its just demands. The power to protect and recover its revenues and property is vital to its existence, and we cannot believe that the Constitution deprives it of this attribute.

The complaint falls far short of stating facts sufficient to show that the contract with the appellant was void upon the ground that it was in violation of article thirteen of the Constitution. The demurrers to the complaint should have been sustained.

Judgment reversed, with instructions to sustain the demurrers to the complaint, and for further proceedings in accordance to this opinion.

*In re Paskins.*IN RE REMOVAL OF PASKINS AS TRUSTEE OF HENSLEY
TOWNSHIP, JOHNSON COUNTY, INDIANA.

[No. 19,853. Filed June 26, 1900.]

155	173
156	384

155	173
166	143

OFFICERS.—Impeachment.—Appeal and Error.—Joint Assignment.—

In a proceeding to impeach a public officer, under the act of 1897 (Acts 1897 p. 278), the person who verifies the accusation is not a party to the proceeding, and an assignment of error by the State, on appeal from the action of the court in sustaining a demurrer to the accusation, made jointly with the person who verified the accusation, presents no question.

From the Marion Circuit Court. *Appeal dismissed.*

W. L. Taylor, Attorney-General, *R. M. Miller*, *H. C. Barnett*, *M. M. Hugg*, *Merrill Moores* and *C. C. Hadley*, for State.

W. E. Deupree, *L. E. Slack*, *W. H. H. Miller*, *J. B. Elam*, *J. W. Fesler* and *W. A. Johnson*, for appellee.

BAKER, C. J.—This proceeding was begun in the Johnson Circuit Court on April 24, 1899, under §35 of an act approved March 8, 1897, entitled "An act providing for the impeachment and removal from office of public officers", Acts 1897 p. 278. On change of venue to the Marion Circuit Court, a demurrer for want of facts was sustained to the "accusation", and this appeal resulted. Paskins moves to dismiss the appeal on the ground, among others, that the assignment of errors is insufficient to present any question to this court. The "accusation" was filed, presented to the court, and prosecuted, not by the prosecuting attorney in the name and on behalf of the State, but by citizens Lang and McFadden through their attorneys Miller & Barnett. To the ruling on the demurrer "the State of Indiana and the petitioners Lang and McFadden" severally excepted. The State of Indiana, by the Attorney-General, and Lang and McFadden, by their attorneys, have jointly assigned error on the ruling and judgment on the demurrer. In

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Rowe v. Bateman, 153 Ind. 633, it was held that an "accusation" under §35 may be verified by the oath of any person, but must be presented to the court and prosecuted by the prosecuting attorney (unless he be the accused) in the name and on behalf of the State, that the State is the party adverse to the accused, and that the person who verifies the "accusation" is not a party to the proceeding. As the alleged error is not available to Lang or to McFadden, and as the State complains of no wrong except jointly with them, the assignment presents no question. *Armstrong v. Dunn*, 143 Ind. 433 and cases cited on page 437; *Earhart v. Farmers Creamery*, 148 Ind. 79; *Hatfield v. Cummings*, 152 Ind. 280.

Appeal dismissed.

STEWART, ET AL. v. THE MARION TRUST COMPANY,
RECEIVER, ET AL.

[No. 19,260. Filed June 27, 1900.]

APPEAL AND ERROR.—Interlocutory Orders.—Building and Loan Associations.—Receivers.—An appeal by the holders of paid up and prepaid stock in a building and loan association will not lie from an order of court directing the receiver of the association, on his petition for instructions, to take proper steps to recover dividends illegally paid to holders of such stock.

From the Marion Circuit Court. *Appeal dismissed.*

L. D. Hay, J. W. Bowles, A. C. Ayres, A. Q. Jones and J. E. Hollett, for appellants.

J. F. Carson, C. N. Thompson, J. W. Noel and F. J. Lahr, for appellees.

MONKS, J.—In a proceeding brought by Lewis Brandenburg, Arthur C. Givan, Frederick Axe, William Axe, and John W. Walker against the Washington Savings and Loan Association, the Marion Trust Company, one of the appellees herein, was appointed receiver of said association.

It appears from the record that prior to February 7,

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1898, the Commercial Building and Loan Association, the Equitable State Building and Loan Association and the Washington Savings Association were separate and distinct building and loan associations, organized and existing under the laws of this State, and it is alleged that on February 7, 1898, said associations were merged and consolidated into the defendant, the Washington Savings and Loan Association and that upon said consolidation, the assets and liabilities of each of the three associations became the assets and liabilities of the defendant, the Washington Savings and Loan Association. Said receiver filed a petition in the court below for instructions in regard to certain dividends alleged to have been paid to the holders of what is denominated "prepaid" and "paid up" stock by the officers of said association, and the officers of the associations consolidated and merged into said Washington Savings and Loan Association, on the ground that said dividends were illegally and wrongfully paid. The court found that said dividends had been illegally and wrongfully paid to said stockholders, and ordered the receiver to take proper steps to recover the same as a part of the assets of said corporation. Afterwards, appellants, who were holders of stock denominated "paid up" and "prepaid" stock in said association, filed applications to set aside and vacate said order of the court instructing the receiver to collect said dividends, on the ground that the same were properly paid to them and could not be recovered. The court heard the evidence on said applications, and refused to vacate said order; from which action of the court appellants appeal.

Appellants were not parties to said petition of the receiver for instructions, and the finding and order in said proceeding were in no sense binding upon appellants. Said order merely authorized the receiver to take proper steps to recover said dividends, but did not and could not adjudge, as against appellants, that they had received such dividends, or, if received by them, that the same were

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illegally and wrongfully paid. Neither did the court, in refusing to set aside and vacate said order, adjudge any of said questions for or against appellants as to said dividends. Such questions could only be conclusively adjudged in favor of or against appellants in a proper proceeding to which they were parties. Said order of the court, instructing the receiver to collect the dividends, was interlocutory and not a final judgment, and there is no statute authorizing an appeal therefrom. As there is no statute authorizing an appeal from the action of the court in refusing to vacate said interlocutory order, the appeal in this case must be dismissed.

Appeal dismissed.

HANSON v. CRUSE ET AL.

[No. 18,848. Filed June 28, 1900.]

LANDLORD AND TENANT.—*Repairs.—Habitability of Premises.*—The relation of landlord and tenant raises neither an implied warranty of habitability nor an obligation to repair on the landlord's part. p. 177.

SAME.—*Failure to Make Repairs.—Damages.*—Damages cannot be recovered by a tenant for personal injuries resulting from the mere continuance of obvious defects to a house occupied by him which the landlord agreed to repair. pp. 177, 178.

PLEADING —*Defective Demurrer.—Appeal and Error.*—Sustaining a defective demurrer is not reversible error where the pleading demurred to was bad. p. 178.

From the Marion Superior Court. *Affirmed.*

G. R. Estabrook and W. V. Rooker, for appellant.

J. B. Kealing and M. M. Hugg, for appellees.

BAKER, C. J.—Appellant set forth in her complaint substantially these facts: On February 26, 1898, appellees owned a dwelling-house in Indianapolis, which was out of repair in that an outside door at the rear of the house was missing, some panes were broken out of windows, and certain locks were gone so that doors could not be closed.

155	176
164	274

155	176
167	68
167	381

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On that day appellees proposed to appellant to repair the house in the particulars mentioned and to rent it to her for one month from that day for \$9; and appellant thereupon accepted the proposition, paid the rental, and moved into the house. As soon as appellant had moved in, appellees failed and refused to make any of the repairs except to place and hang the outside door, which was done on March 5, 1898. By reason of appellees' failure to repair the house, appellant was subjected to great exposure and her health was permanently impaired, all without fault on her part, and to her damage, \$10,000. All of the appellees demurred to this complaint on the ground that it did not state facts sufficient to constitute a cause of action. Some, on the further ground that the court did not have jurisdiction over them. A general order sustaining all the demurrers was made, and, on appellant's refusal to plead further, final judgment was rendered for appellees.

In this case, there was no misrepresentation nor concealment of the defects complained of. The defects were of the most obvious nature and were open equally to the knowledge of both parties. There was no express warranty that the house was habitable. The relation of landlord and tenant raises neither an implied warranty of habitability nor an obligation to repair on the landlord's part. *Purcell v. English*, 86 Ind. 34, 44 Am. Rep. 255; *Lucas v. Coulter*, 104 Ind. 81. In the absence of a contract that the landlord shall make repairs, the burden would fall on the tenant if he wanted them made. But the tenant may contract with the landlord, as well as with another, for the making of repairs. And here such a contract was made. In the payment made by appellant was included the consideration for appellees' undertaking to repair. Under the contract, appellant was entitled to the repairs or to damages for the breach of the contract. Appellees broke their contract, and are liable in damages. But what is the measure? On principle, the landlord who is paid by the tenant to make repairs

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that he is not otherwise under obligation to make should be held to exactly the same liability that a stranger-contractor would incur. Damages for personal injuries resulting from the mere continuance of obvious defects, such as existed here, and which the tenant has contracted to have repaired, are not recoverable from the contractor. They are deemed to be too remote, and not within the contemplation of the parties at the time the contract was made. The injury is attributable to the tenant's want of care in the use of the property rather than to the contractor's breach. *Hendry v. Squier*, 126 Ind. 19, 9 L. R. A. 798; *Feary v. Hamilton*, 140 Ind. 45, and authorities cited on page 53; *Hamilton v. Feary*, 8 Ind. App. 615, 52 Am. St. 485. Notes to *Hines v. Willcox* (Tenn.), 34 L. R. A. 830, 33 S. W. 914. There was no error in sustaining the demurrers.

Appellant claims that the action of the court was erroneous because the demurrer for want of jurisdiction was not well founded, and because other demurrers were improperly drafted. A judgment will not be reversed for such reasons, if the pleading demurred to is in fact bad. *Bollman v. Gemmill*, ante, 33.

Judgment affirmed.

 ALLEN ET AL. v. HOLLINGSHEAD.

[No. 18,621. Filed June 29, 1900.]

SPECIAL FINDING.—Motions.—Practice.—Motions to modify a special finding, or to make additional findings, are not recognized by the code of procedure, and such motions are properly overruled, rejected or stricken out by the court. *p. 180.*

APPEAL AND ERROR.—Record.—Motions.—A motion to strike out a pleading and the ruling of the court thereon can only be made part of the record by bill of exceptions or by order of court. *p. 181.*

SAME —Record.—Motions.—Order of Court.—To make the ruling of the court in sustaining a motion to strike out a pleading a part of the record by order of court, the motion, ruling and pleading must be set out in full in the order. *p. 181.*

155	178
158	300
158	478
155	178
159	241
159	242
155	178
168	300
155	178
168	49

Allen v. Hollingshead.

EVIDENCE.—Variance.—Appeal and Error.—A cause will not be reversed on appeal because of a variance between the note described in the complaint and the one produced at the trial and offered in evidence, where no reason was given at the time why said note was not admissible in evidence. *pp. 181-185.*

APPEAL AND ERROR.—Special Finding.—Practice.—It is not reversible error to overrule a motion for judgment on a special finding and conclusion of law, if the judgment when so rendered would not conform to the conclusion of law, even if such conclusion is erroneous. The proper remedy is by an exception to such conclusion of law, and assigning the same as error on appeal. *p. 186.*

SPECIAL FINDING.—Pleading.—Husband and Wife.—A conclusion of law in an action to foreclose a mortgage is not erroneous as to defendant because of the failure of the special finding to show that she was the wife of her codefendant, as alleged in the complaint, where she joined with her husband in a general denial which stated that they were husband and wife, and no answer was filed denying that they were husband and wife. *p. 186.*

From the Fulton Circuit Court. *Affirmed.*

G. W. Holman and R. C. Stephenson, for appellants.

Harry Bernetha and Enoch Myers, for appellee.

MONKS, J.—Appellee brought this action against French Hollingshead and wife and appellants, Charles A. Allen and wife, to foreclose a mortgage executed by French Hollingshead and wife on real estate, and to recover a personal judgment on the promissory note secured by said mortgage.

Said cause was tried by the court, a special finding of facts made, and conclusions of law stated thereon in favor of appellee, and, over a motion for a new trial, personal judgment was rendered against said Charles A. Allen and French Hollingshead, and a decree of foreclosure against all of said defendants in the court below.

Allen and wife appeal and have perfected a term time appeal. Appellants made several motions asking the court to modify and change certain of its findings of fact, and to find additional facts, which motions were overruled by the court. The seventh, eighth, ninth, and tenth errors assigned are predicated upon said rulings of the court.

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Motions to modify or change a special finding, or to make additional findings, are not recognized by our code of procedure, and the same are properly overruled, rejected, or stricken out by the court. *Banner Cigar Co. v. Kamm, etc., Co.*, 145 Ind. 266, 268, 269; *Smith v. Barber*, 153 Ind. 322, 332; *Bunch v. Hart*, 138 Ind. 1, 3; *Sharp v. Malia*, 124 Ind. 407, 409; *Windfall, etc., Co. v. Terwilliger*, 152 Ind. 364, 365; Elliott's App. Proc. §757.

The other errors assigned and not waived call in question each conclusion of law, the action of the court in overruling appellant's demurrers to the first paragraph of the amended complaint, and the second amended paragraph of complaint in sustaining appellee's motion to strike out the cross-complaint of Charles A. Allen, in overruling the motion of Mary Allen, wife of Charles A. Allen, for judgment in her favor on the findings of fact and conclusions of law, and in overruling appellant's motion for a new trial.

It is admitted that the first paragraph of the amended complaint and the second amended paragraph of complaint are good as to appellant Charles A. Allen, but it is insisted that neither of said paragraphs states facts sufficient to constitute a cause of action against appellant Mary Allen, his wife.

The note sued upon in the first paragraph of the amended complaint was executed by French Hollingshead and Charles A. Allen, and the mortgage to secure the same was executed by said Hollingshead and Carrie L. Hollingshead, his wife. It is alleged in said paragraph, among other things, that the legal and record title of the real estate described in said mortgage was in said Hollingshead when said mortgage was executed; that afterwards a part of said real estate was in proceedings for partition in the Fulton Circuit Court, in which appellant Charles A. Allen was plaintiff, and French Hollingshead and wife were defendants, set off to said Charles A. Allen; that said Carrie L. Hollingshead is the wife of said French Hollingshead, and

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Mary Allen is the wife of said Charles A. Allen, and both are made defendants to answer as to their interest, and foreclose their equity of redemption, and that said Mary Allen is made a defendant to answer as to her interest as the wife of said Allen.

The allegations of the amended second paragraph of the complaint, in regard to appellant Marry Allen, are substantially the same as the first paragraph. The record shows that the notes and mortgage sued upon in said paragraphs were properly filed as exhibits and made a part thereof. Said paragraphs were sufficient as to each of said appellants to withstand a demurrer for want of facts.

It is next insisted that the court erred in sustaining appellee's motion to strike out the cross-complaint of Charles A. Allen. Said motion to strike out said cross-complaint and the ruling of the court sustaining said motion are not a part of the record unless made so by a bill of exceptions or order of court. *State v. Halter*, 149 Ind. 292, 304; *Dudley v. Pigg*, 149 Ind. 363, 369; Ewbank's Manual, §26.

It is claimed that said motion and the ruling thereon were made part of the record by order of court. To make the same a part of the record by such order the motion and cross-complaint and the ruling of the court thereon must be set out in full in said order. *Close v. Pittsburgh, etc., R. Co.*, 150 Ind. 560; *Pennsylvania Co. v. Ebaugh*, 152 Ind. 531, 533; Ewbank's Manual, §§27, 36. This was not done in this case, and no question concerning said action of the court is before us for consideration.

It is next insisted by appellants that the finding is not sustained by sufficient evidence and is contrary to law, because the note sued upon reads, "We or either of us promise to pay", etc., and that it also provides "interest at the rate of seven per cent. per annum, payable annually, on note or judgment until paid"; while the note read in evidence and found by the court reads, "We promise to

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pay," etc., and provides for the payment of "interest at seven per cent. per annum after maturity". When the note was offered and read in evidence by appellee no reason was given why said note was not admissible in evidence. If the reason now urged for excluding said note had then been stated, the copy of the note filed with the complaint could have been amended to conform to the note read in evidence. §§365, 394, 399 Burns 1894, §§362, 391, 396 R. S. 1881 and Horner 1897. The rule is that when there is a variance between the contract described in the complaint and the one produced at the trial, this court will consider and treat the same as amended below. *Davis v. Doherty*, 69 Ind. 11; *Lucas v. Smith*, 42 Ind. 103; *Perdue v. Aldridge*, 19 Ind. 290; *Singleton v. O'Blenis*, 125 Ind. 151; *Chaney v. State*, 118 Ind. 494, 501, 502; *Buchanan, Adm., v. State*, 106 Ind. 251, 255; *Reddick v. Keesling*, 129 Ind. 128; *Ashton v. Shepherd*, 120 Ind. 69.

It was held in *Krewson v. Cloud*, 45 Ind. 273, that when the attention of the court below was not called to a discrepancy between the allegations of the complaint and the proof, objection can not be made for the first time in this court, but the pleading will be regarded as amended.

It appears from the special findings that on March 3, 1893, Charles A. Allen and French Hollingshead purchased of one Buckingham two sections of land in Fulton county, Indiana, for the sum of \$24,320, and that on the same day it was agreed that said Allen and Hollingshead should each own the undivided one-half of said land, and on the same day Buckingham executed a deed therefor to said French Hollingshead. On said March 30, 1893, said Hollingshead and wife executed a mortgage to said Buckingham for \$17,000 for the balance of the purchase money on said land. On April 3, 1893, said Hollingshead and wife executed a mortgage to appellee, Morgan Hollingshead, on said real estate, to secure a note of same date for \$7,776, payable one year after date with interest at seven per cent.

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per annum after maturity, executed by said French Hollingshead and Charles A. Allen. The actual amount of money received on said note was \$6,820. That during said month of April, 1893, said French Hollingshead and appellee, his brother, moved upon and took possession of said real estate. On said April 3, 1893, French Hollingshead and his wife executed a deed to said Charles A. Allen for the undivided one-half of said real estate, which was given by said Allen to said French Hollingshead to be left for record in Rochester, Indiana; that said Hollingshead failed, neglected and refused to leave said deed for record, and also refused to return the same to said Allen; that, at the request of said French Hollingshead, during the farming season of 1893, said Allen furnished for use, in connection with the improvement and farming of said real estate, \$2,061; that appellee and French Hollingshead took and appropriated to their own use all the proceeds resulting from the farming of said land for the years 1893, 1894, and 1895, and denied that said Allen owned any part of said lands. On November 29, 1894, said Allen commenced an action in the court below against said French Hollingshead and wife to quiet his title to an undivided one-half of said real estate, and for partition of the same; that on January 3, 1895, the mortgage in suit was filed for record. On April 19, 1895, French Hollingshead and wife executed a quitclaim deed to appellee for one of said two sections of real estate, and he immediately took full possession thereof; and on May 6, 1895, said Allen filed in said action to quiet title, and for partition, a supplemental complaint, making appellee, Morgan Hollingshead, and his wife defendants thereto. At the November term of said court, 1895, judgment was rendered in said court quieting title in said Allen to his undivided interest in said two sections of land, and commissioners were appointed to make partition thereof. It was found in said action that there was due said Allen from French Hollingshead in excess of all improvements for

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money furnished by him and for his share of the rent and profits, \$3,366.12. There was set off to said French Hollingshead as his share of said lands section twenty and the southwest quarter of the southwest quarter of the other section, and to Charles Allen the other section, being section seventeen, except the southwest quarter of the southwest quarter thereof. On June 4, 1896, French Hollingshead and wife executed to the Northwestern Life Insurance Company a mortgage to secure a loan of \$10,000 on said section twenty, and on the 17th day of July, 1896, he paid \$8,500 thereof to said Buckingham, who released of record said section twenty and the southwest quarter of the southwest quarter of section seventeen from the lien of his mortgage, and gave credit for said payment on said \$17,000. On June 25, 1896, said French Hollingshead and his wife executed to appellee a mortgage on said section twenty for the sum of \$4,492.70, and at the same time said French Hollingshead and wife executed a deed for the forty acres, owned by him in said section seventeen, to appellee, who released said section twenty and said forty acres from the lien of the mortgage executed to him by French Hollingshead and wife, to secure the note for \$7,776, signed by said French Hollingshead and Charles A. Allen; that said mortgage for \$10,000 and said mortgage for \$4,492.70 are still in force and unpaid.

The conveyance of said real estate by French Hollingshead and wife to appellee and said release of said Buckingham mortgage and said release of the mortgage to appellee and the arrangements respecting said transactions were all without the knowledge or consent of said Charles A. Allen; that at the time of said transactions said French Hollingshead was insolvent; that the real estate set off to Charles A. Allen in said partition proceedings has never been released from the Buckingham mortgage, nor the mortgage to appellee; that one-half of the mortgage debt due from French Hollingshead and Charles A. Allen to appellee was paid by

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said French Hollingshead by the execution of said second mortgage for the same, to appellee; that the remaining one-half of said indebtedness to appellee is due and unpaid. Said section twenty is worth \$19,200, and the tract of forty acres conveyed to appellee is worth \$1,200.

Upon said facts the court stated conclusions of law: (1) That there is due and owing to appellee from French Hollingshead and Charles A. Allen the sum of \$4,325; (2) that the mortgage executed by French Hollingshead and wife to appellee should be foreclosed on the real estate in said section seventeen, set off to Charles A. Allen, and the same ordered sold to pay said \$4,325, and a judgment over be rendered against said Hollingshead and Allen for the same.

It is insisted by appellants that appellee, by the release of the real estate from the lien of the mortgage executed to him by French Hollingshead and wife, Charles A. Allen, was discharged as to the value of the real estate released to him. *Holland v. Johnson*, 51 Ind. 347.

It is well settled that if the owner of a note on which there is a surety holds securities from the principal in said note, and he releases the same with knowledge of such suretyship, the surety on said note is released to the extent of the value of the securities so released. In this case, however, it is not found that said Allen was surety on the note executed to appellee, or that appellee had any knowledge of said suretyship when he released a part of the real estate described in said mortgage from a lien thereof. The rule declared in *Holland v. Johnson*, *supra*, and urged by appellants, is not, therefore, applicable to the facts stated in the special finding.

The \$3,366.12 found to be due Allen from French Hollingshead in the partition proceedings, as stated in the special finding, was not, under the facts found, a credit upon the note sued upon in this case, nor were appellants entitled to have the same deducted from the amount of said note and judgment rendered for the balance only.

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It is next insisted that the court erred in overruling the motion of appellant Mary Allen, for a judgment in her favor on the facts found and the conclusions of law thereon. Said motion was properly overruled for the reason that under the second conclusion of law appellee was entitled to a decree of foreclosure against all of the defendants in the court below.

It is not reversible error to overrule a motion for judgment on a special finding and conclusion of law, if the judgment when so rendered would not conform to the conclusion of law, even if such conclusion is erroneous. *Nelson v. Cottingham*, 152 Ind. 135, and cases cited. The proper remedy is by an exception to such conclusion of law, and assigning the same as error on appeal. *Nelson v. Cottingham, supra*.

It is urged that the second conclusion of law is erroneous as to appellant Mary Allen, for the reason that it does not appear from the special finding that she was the wife of her co-appellant, as alleged in the complaint. Mrs. Allen joined with her husband in an answer of general denial which stated that they were husband and wife, and no answer filed by them, or either of them, denied that they were husband and wife as alleged. Under such issues it was not necessary to make any special finding on that subject. It is clear that the court did not err in its conclusions of law.

Finding no available error in the record, the judgment is affirmed.

CAMPBELL ET AL. v. CITY OF INDIANAPOLIS ET AL.

[No. 19,258. Filed June 29, 1900.]

CONSTITUTIONAL LAW.—*Act Authorizing Organization of Board of School Commissioners for City of Indianapolis.—Special Legislation.*—The act of March 3, 1871, authorizing the organization of a board of school commissioners in all cities of 80,000 or more inhabitants, "according to the United States census for the year 1870," there being only one city in the State at the time of the enactment of the statute containing such a population, is unconstitutional, being special legislation. pp. 190-200.

165	196
161	86
162	174

155	186
168	274

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CONSTITUTIONAL LAW.—*Act Concerning Schools in Cities of 100,000 Inhabitants.*—The act of March 4, 1899 (Acts 1899 p. 434), concerning common schools in cities having a population of 100,000 "according to the last United States census" is an act of general application, and is constitutional, though at the time it was enacted there was but one city in the State containing such population. p. 203.

SAME.—*Act Concerning Schools in Cities of 100,000 Inhabitants.*—The act of March 4, 1899 (Acts 1899 p. 434), "concerning common schools in cities having a population of 100,000," etc., is not rendered special legislation and, therefore, unconstitutional by the provision of section 4 thereof, to the effect that, "At the city election occurring on the second Tuesday of October, 1899, five members of the board of school commissioners shall be elected to serve as herein provided," although there was at the time of the enactment no city in the State other than Indianapolis which held an election on the second Tuesday of October, 1899. p. 204.

SAME.—*Remedial Legislation.*—Although the act of March 3, 1871, authorizing the election and defining the duties of a board of school commissioners for cities of 80,000 population is unconstitutional, the acts of such board in issuing and negotiating school bonds are cured by the act of March 4, 1899 (Acts 1899 p. 434). pp. 205, 206.

MUNICIPAL CORPORATIONS.—*School City of Indianapolis.*—*Debt Limit.*—The debts of the school city of Indianapolis and those of the civil corporation are not to be aggregated to determine the debt limit to which either is entitled under the Constitution, and the right or power of either of these corporations to contract an indebtedness not in excess of the limit fixed by the Constitution is affected only by its own existing debts. p. 213.

From the Marion Superior Court. *Affirmed.*

W. H. H. Miller, J. B. Elam, J. W. Fesler, S. D. Miller, and F. Winter, for appellants.

J. W. Kern, J. E. Bell, Benj. Harrison and Baker & Daniels, for appellees.

JORDAN, J.—Appellants Campbell and Wild, as citizens and taxpayers of the city of Indianapolis, Indiana, on January 30, 1900, instituted this action to enjoin the defendants below, the board of school commissioners of the school city of Indianapolis and the civil city of Indianapolis, from issuing certain school bonds to the amount of \$100,000 as the obligations of the said school corporation, and from

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paying either the interest or principal upon outstanding school bonds issued by the board of school commissioners of said city in 1890.

The city of Indianapolis and the board of school commissioners, the latter representing the school corporation thereof, each separately demurred to the complaint for insufficiency of facts. These demurrers were each sustained, and final judgment was rendered in favor of the defendants; and this appeal is prosecuted by appellants from that judgment upon the exceptions reserved by them to the ruling of the court in sustaining the demurrer to their complaint.

It is virtually conceded, and properly so we think, that the civil city of Indianapolis is not a necessary party to this action. It may be further asserted that it is not even a proper party thereto, and, so far as the questions here involved are concerned, the civil city of Indianapolis may be considered as eliminated from the case.

The material facts disclosed under the averments of the complaint are as follows: Appellee, the board of school commissioners, has the charge and control of the affairs and business of the school city or school corporation of Indianapolis and of all matters relating to the common schools of such city. This board was created and organized, as alleged, under an act of the General Assembly of this State in force March 3, 1871 "with the amendments thereto and supplementary acts of the legislature subsequently enacted and the act of March 4, 1899". Such board has had the charge and control of the public schools and school affairs of the school corporation of the city of Indianapolis since its organization under the act of March 3, 1871. On March 1, 1890, the aggregate indebtedness of the civil city of Indianapolis and of its school corporation was \$2,145,500, which amount at that time exceeded two per cent. of the taxable property of the city of Indianapolis. It is further averred that at no time since March 1, 1890,

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and the time of filing the complaint in this action has the aggregate indebtedness of the civil city and the school city combined been under two per cent. of the assessed taxables of the current year, as shown by the city's tax duplicate.

By reason of the increased value of the taxable property of the city and by payment of a portion of the public debt incurred by the civil city, the latter's indebtedness has been reduced within the two per cent. limit. On March 1, 1890, the board of school commissioners, acting in behalf of and representing the school corporation of that city, issued bonds to the amount of \$80,000, payable ten years after date with interest at four per cent. per annum. These bonds were sold and negotiated by said board of school commissioners and the proceeds arising from the sale thereof were applied to and used for legitimate school purposes. On July 1, 1890, said board issued and sold \$20,000 additional school bonds, which, including those issued on the 1st day of March of that year, made in the aggregate \$100,000; all of which bonds were issued and negotiated by the said board upon the assumption and under the claim that it was a corporation entirely independent of the civil city and that as such school corporation it had the power to contract an indebtedness of its own for school purposes to an amount not exceeding two per cent. of the taxable property of the city of Indianapolis, notwithstanding the fact that at the time of the issue of said bonds the indebtedness of said civil city and the indebtedness of the school corporation combined exceeded two per cent. of the taxable property for the year 1890 and for each following year thereafter.

It is further averred that this board of school commissioners claim and assert on behalf of its school corporation that the indebtedness thereof is not to be counted or considered as a part of the indebtedness of the civil city of Indianapolis in order to determine whether the latter has exceeded the two per cent. limit prohibited by the Consti-

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tution of this State. The board of school commissioners in 1890, in contracting the indebtedness by the issue and sale of the bonds heretofore mentioned, acted under the claim and assumption, and so continues to act, that each of the said corporations, civil and school, might contract debts independently of each other, and that the indebtedness of each, under the provisions of article thirteen of the State Constitution must be admeasured and considered independently of each other. The bonds issued on March 1, 1890, will mature the 1st day of March, 1900, and the series issued on July 1st of that year will mature on July 1, 1900; and it is alleged in the complaint that the holder of these latter bonds has agreed with said board of school commissioners to accept the payment thereof on March 1, 1900, in consideration of the fact that the board has agreed to pay him interest on such bonds to April 1, 1900.

In order to take up and fund these two series of bonds issued in 1900, it is averred that the board has ordered by resolution that other bonds be issued and sold for that purpose, the same to draw interest at three and one-half per cent. and to bear date of March 1, 1900, etc. It is further alleged that said board, unless enjoined, will, on March 1, 1900, pay out of the money in its treasury the interest due on the bonds of 1890, which will amount to over \$1,800.

There is no averment in the complaint that the bonds issued in 1890 increased the indebtedness of the school city of Indianapolis to an amount in excess of the two per cent. of its taxable property or that its present indebtedness is in excess of that amount.

The complaint closes with the prayer that the court enjoin the board of school commissioners from issuing the proposed new bonds and from paying any part of the school bonds issued in 1890, principal or interest.

The cardinal question involved in this appeal, under the facts, is in respect to the validity of the \$100,000 of school bonds, issued by the board in 1890 as stated, which the pres-

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ent board is now proposing to refund by the issue and sale of new bonds. It is insisted by counsel for appellants that the decision of this principal question involves three other subordinate propositions, namely: (1) Was the statute of March 3, 1871, which authorized the organization of a board of school commissioners of the school corporation of the city of Indianapolis a valid act of the legislature? (2) If invalid, have the acts of said board in issuing and negotiating the school bonds, and contracting thereby the indebtedness in issue in this action, been remedied or cured by the provisions of the statute in force March 4, 1899? (3) Are the debts of the civil city of Indianapolis and those of the school city or school corporation, incurred under the control and government of its board of school commissioners, to be treated and considered under the law as the obligations of distinct and separate municipal corporations, or must the indebtedness of each be combined and limited alone to the civil city, to determine if the latter has exceeded the two per cent. limit of indebtedness prohibited by article thirteen of the State Constitution.

We address ourselves to a consideration of these questions fully impressed with their great public importance, as it is evident, as insisted by counsel for appellee, that a decision adverse to it would in the main be disastrous to the public schools of Indianapolis, and in its effect would result in coercing appellee to repudiate an indebtedness incurred in building up and promoting the public school system of that city, and, as contended, would render worthless over \$700,000 of bonds issued by the school board and the civil city. At the very threshold we are confronted with the contention of counsel for appellee that appellants are not in a position in this action to question the validity of the organization of the board of school commissioners. It is urged that this body, as created or provided for by the statute of March 3, 1871, has been in existence and recognized as a legitimate organization by both the people of

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that city and its public authorities for a period of twenty-nine years, and not until the institution of this action has the validity of that board or its authority to act in the management and control of the school affairs of the city of Indianapolis in any manner been denied. Therefore, it is contended that, by this long acquiescence in the existence of this board upon the part of the people and public officials of that municipality, appellants are precluded from attacking its validity in this collateral proceeding. Numerous authorities are cited to sustain this contention. It is also further urged that appellants' petition to secure an injunction against the payment of the school bonds issued by the board in 1890 is devoid of equity for the reason that it appears that they have been guilty of gross laches in delaying for almost ten years in making their attack upon the bonds in controversy.

In consideration of the view which we entertain in respect to the principal questions which appellants urge upon us for our determination, we pass the decision of those presented by appellee in relation to the rights of appellants to maintain this action, as we recognize that the public importance of the principal questions involved herein requires that they be settled, and not left undetermined to be agitated again in the future.

By section 4 of an act of our legislature in force since March 6, 1865 (Acts 1865, p. 3), entitled "An act to provide for a general system of common schools, etc", it is declared that, "Each civil township and each incorporated town or city in the several counties of the State is hereby declared a distinct municipal corporation for school purposes, by the name and style of the civil township, town or city corporation respectively, and by such name may contract and be contracted with, sue and be sued, in any court having competent jurisdiction; and the trustee of such township, and the trustees provided for in the next section of this act, shall, for their township, town, or city, be

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school trustees and perform the duties of clerk and treasurer for school purposes." §4438 R. S. 1881, §5914 Burns 1894.

The government of the affairs of this distinct school corporation for school purposes in each incorporated town and city in the State was, under the provisions of section five of the school law of 1865, lodged in a board of school trustees to be elected in each city by its common council. This general school law of 1865 provided a uniform system of common schools throughout the State, which applied to the city of Indianapolis in like manner as it did to any other incorporated city, and, under the provisions of section four, "a distinct municipal corporation for school purposes" was created within said city, and by that act placed under the government or control of a board composed of three school trustees to be elected by the common council. And so the law pertaining to the school affairs of that city seems to have remained until March 3, 1871, when the legislature passed a statute entitled "An act providing for a general system of common schools in all cities of 30,000 and more inhabitants, and for the election of a board of school commissioners for such cities, defining their duties and prescribing their powers, etc." Acts 1871, p. 20. The provisions of this statute and of those amendatory or supplemental thereto, with the exceptions of section seven, will be found included in §§5936 to 5948 Burns 1894.

The first section of this statute of 1871 provides that "In all cities of this State of 30,000 or more inhabitants, according to the United States census for the year 1870, there shall be elected, by the qualified electors of each school district of such city, one school commissioner, to serve as a member of the board of school commissioners of such city, etc." Section two provides for dividing any such city into school districts, section three for the organization of such board of school commissioners and for filling any vacancy

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therance of the common school system established therein, that a change ought to be made in the governing body of the school corporations of such cities, and that additional and extraordinary powers should be conferred upon such school corporations. Therefore, when the provisions of this statute are considered, it is manifest, we think, that the principal purpose or purposes of the legislature, by the enactment thereof, was to change the governing board of the school corporations in any city to which the law might become applicable, by superseding the then existing board of trustees by a board of school commissioners to be elected by the electors of the city as therein provided, and thereby place the educational affairs pertaining to such school corporations under the control and government of said boards, and to invest the latter, in regard to the respective school corporations under their control, with additional and extraordinary powers, especially in regard to the issuing and sale of bonds in order to secure loans of money in favor of such school corporations, to be used and expended by such boards in the payment of expenses incurred by the purchase of school grounds and construction of school buildings. There certainly can be no claim or pretension that previous to this legislation of 1871 there was any law in this State under which the school corporation of the city of Indianapolis could claim the right or power, through its board of school trustees, to contract an indebtedness by the issue and sale of bonds for the purposes provided by that statute. *Fatout v. Board, etc.*, 102 Ind. 223; *Wilcoxon v. City of Bluffton*, 153 Ind. 267.

In *Fatout v. Board, etc.*, *supra*, the force and effect of the act in controversy, to an extent, was considered by this court, and in the course of the opinion it is said: "The powers conferred upon such board, by this clause of the statute, are limited only by the educational wants of the school corporation, under the board's control, in the exercise of a sound and reasonable discretion. * * * Con-

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struing the provisions of the above entitled act of March 3, 1871, in connection with §4438 R. S. 1881, in force since March 6, 1865, the city of Indianapolis is a 'distinct municipal corporation for school purposes, by the name and style' of the board of school commissioners of the city of Indianapolis 'and by such name may contract and be contracted with, sue and be sued, in any court having competent jurisdiction.' "

The school corporations of this State, as we have seen, are the creatures of the legislature. They are involuntary corporations created as instrumentalities or agencies in the hands of the State to carry out its will in respect to its great common school system, and at all times are subject to the legislative will; provided, of course, that such power must be exercised by the legislature so as not to disturb or impair existing contract rights. Certainly, then, the State, through its legislature, may at its pleasure at any time change the trustees of such corporations, and confer upon them and authorize them to exercise any and all powers that may be necessary to carry out the object or purpose of their creation. *Board v. Center Township*, 143 Ind. 391; *Center School Township v. State*, 150 Ind. 168; *Root v. Erdel-meyer*, 37 Ind. 225.

In the case of *Schneck v. City of Jeffersonville*, 152 Ind. 204, in considering the power of the legislature over municipal corporations, this court on page 212 of its opinion said: "Subject to the restrictions of the State and federal Constitutions, the legislature would seem to have complete power and control over municipal corporations. Especially is this true in reference to authorizing them to contract debts, and to issue and sell negotiable bonds, and other evidences of such indebtedness."

Assuming for the present that the legislature, in the enactment of the statute of 1871 and the acts supplemental thereto, exercised its power in a valid manner, we are of the opinion that when the plain provisions of clauses five

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and eight of section four of that act are considered along with those of the supplemental act in force March 5, 1889 (§5940 Burns 1894), the fact is clearly demonstrated that the legislature thereby conferred upon the school corporation of any city of this State which had the designated population of 30,000, or over, under the federal census of 1870, the power, to be exercised through its board of school commissioners, to borrow any sum of money not in excess of the limit fixed by §5940, *supra*, by the means of issuing and negotiating bonds, the money so obtained by such loan to be expended, under the order of the board of school commissioners, for the purpose of paying the indebtedness of such school corporation incurred in the purchase of grounds or in building schoolhouses, or to be used for the purpose of taking up or refunding bonds or other evidence of indebtedness issued by such school corporation for such purposes. It is also made evident by these provisions of the statute that the legislature intended that the authority to borrow money so conferred upon such corporation should be exercised by this board of school commissioners independently of the civil city, without obtaining the consent or sanction of the latter. It would certainly follow, under such circumstances, in the absence of any provision or declaration of the legislature to the contrary, that such indebtedness and liability created by the issue and sale of such bonds would be that alone of the school corporation, and that no indebtedness or liability would be incurred thereby upon the part of the civil city. *Fatout v. Board, etc.*, 102 Ind. 223; *Wilcoxon v. City of Bluffton*, 153 Ind. 267.

In this latter case, on page 270 of the opinion, it is said: "It can not be successfully controverted but what the legislature of this State, if it deems proper, may empower school corporations of cities and towns to issue and sell their bonds in order to raise money to construct schoolhouses, etc., and in this manner create an indebtedness upon the part of such school corporations, for which they alone would be liable."

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We are confronted, however, as previously stated, by appellants with the contention that this statute of March 3, 1871, together with the amendatory and supplemental acts enacted in respect thereto, under which the board of school commissioners of the school city of Indianapolis, as alleged, was organized, and under which it assumed to act in issuing and negotiating the school bonds of 1890, must be regarded as special legislation providing for supporting common schools and for the preservation of school funds, and is therefore rendered invalid for the reason that it is violative of specification thirteen, section twenty-two, article four of the State's Constitution. This section and specification, so far as pertinent to the question here involved, read as follows: "The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say, * * * providing for supporting common schools and for the preservation of school funds."

Counsel for appellants argue with much earnestness that the act in question must be regarded as special legislation, for the reason that, by the express provisions of its first section, it is limited in its application to cities only of 30,000 or more inhabitants, according to the United States census for the year 1870. Therefore, they insist that the city of Indianapolis is the only one in this State which, at the time of the passage of the act, had attained to the standard of population fixed by its provisions.

Of this fact we take judicial notice, as all courts are required to take judicial knowledge of the census of the United States. It is contended that no matter how many cities of the State might, under the federal census of 1880 or 1890, or any other future census, have 30,000 or more inhabitants, the act in controversy would not be applicable to any of them, because they did not and could not in reason have such population according to the census of 1870. It is true that this statute does not in the main profess to be a

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special law. Its title would seem to disclose that it was the intention of the legislature to enact a law "for a general system of common schools in all cities of 30,000 or more inhabitants and for the election of a board of school commissioners for such cities, etc."

The seventh section thereof, as previously said, extends its provisions to any city having less than 30,000 inhabitants. This latter section, however, as insisted by appellants, is possibly invalid for the reason, as claimed, that it is not properly embraced in the title. Without deciding in regard to the constitutional infirmity alleged to exist in respect to this section, it may, nevertheless, be considered, in order to cast light upon the question as to whether the act was intended to be general or special legislation.

Were it not for the express declaration in section one, which absolutely fixes the census of 1870, and confines it to that alone, as the one by which the population is to be determined, it might be viewed as one general in its operation, applying alike to all cities within the classification of 30,000 or more inhabitants. But this express declaration upon the part of the legislature would seem to countervail or destroy whatever general features the act possesses by restricting its operation to such cities as had the required population according to the census of 1870. Any and all other cities, which might by a future census be shown to be within the classification of 30,000 inhabitants or more, by this express provision of the statute would necessarily be excluded from its operation. That, under such circumstances, a law of this character must be regarded as special, and not general, legislation, seems to be, according to the authorities, a well settled proposition.

As to whether the statute can be said to be one providing for the support of common schools and for the preservation of school funds, within the meaning of specification thirteen of section twenty-two of article four of the Constitution, which prohibits the passage of a special law by the

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legislature for such purpose, we do not deem it necessary to decide, in view of the opinion which we entertain relative to the second question propounded by appellants.

There is virtually no contention that there was any absence of power, upon the part of the legislature, to authorize school corporations to perform, through boards of school commissioners, the acts or functions mentioned and provided for by the act of 1871 and other acts supplemental thereto. The defect or infirmity of which appellants complain consists in the method employed by the legislature in providing for the creation of boards of school commissioners to act for such corporation and by which they were empowered to perform the duties and functions mentioned and provided for under said act. The defect or invalidity with which, as appellants claim, the act of 1871 is impressed, does not extend to the absence of legislative authority to confer the power or powers therein provided by reason of any restriction of fundamental law, but it applies only to the particular special method by which the legislature undertook to exercise the power with which it was invested. In such cases counsel for appellee contend that the State, as the sovereign power, through its legislature, may subsequently remedy or cure acts previously performed under color of an invalid law enacted under such circumstances. It is therefore argued by counsel that, under the provisions of an act of the legislature in force March 4, 1899 (Acts 1899, p. 434), the indebtedness of the school corporation of the city of Indianapolis, incurred by the issue and sale of the bonds of 1890 by the predecessor of the present board of school commissioners, has been validated and the payment thereof by appellee legalized.

Appellants, however, seek to parry the force of appellees' argument upon this feature by contending that the act of 1899 is also special legislation, for the reason that under its provisions the city of Indianapolis is the only one in the State to which it can apply; and as it attempted in a

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special manner to legislate in respect to the support of common schools, it must, under the provisions of the Constitution heretofore referred to, be condemned as invalid. Consequently it is insisted that by no means can the act of 1899 operate to remedy or legalize the invalidity or defects urged against the bonds in issue in this action.

This position or claim of counsel in respect to the act in question being a special law is, in our judgment, not tenable, and can not be sustained.

The act of 1899, by its title, professes to be a general law concerning common schools in cities containing a population of more than 100,000. The first section of this act is as follows: "Be it enacted * * * That the government of common schools in cities of 100,000 or more inhabitants, according to the last United States census, shall be vested in a board of school commissioners, which shall consist of five school commissioners. The said board of school commissioners shall have and exercise all the powers now conferred by an act of the General Assembly of this State, approved March 3, 1871, entitled 'an act providing for a general system of common schools in all cities of 30,000 or more inhabitants, and for the election of a board of school commissioners for such cities, and defining their duties and prescribing their powers, and providing for common school libraries within such cities', and all acts amendatory thereof and supplemental thereto; and also all powers now conferred by law on boards of school commissioners in cities of 30,000 or more inhabitants, according to the United States census of 1870, as well as the powers now conferred by law on boards of school commissioners in cities of 100,000 or more inhabitants, except as otherwise herein provided. *And said board of school commissioners provided for by this act shall assume, pay and be liable for all the indebtedness and liabilities of boards of school commissioners heretofore elected under the above described acts.*" (Our italics.)

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In this latter section, it is declared that the government of common schools in cities of 100,000 or more inhabitants, "*according to the last United States census*" (our italics), shall be vested in boards of school commissioners. The same section declares that such board shall have and exercise all the powers conferred by the act of March 3, 1871, being the statute previously considered, as well as those conferred by all acts amendatory of and supplemental to such act of 1871, "as well as the powers now conferred upon boards of school commissioners in all cities of 100,000 or more inhabitants."

By section twenty-six it is provided that the general school law of the State and all laws and parts of laws applicable to the general system of common schools in such school city and not inconsistent, etc., "shall be in full force and effect in such city."

It would seem that the legislature intended to substitute the act of 1899 for that of 1871 and for all acts amendatory and supplemental thereto, as mentioned in the first section of the former statute, and thereby to confer upon the school corporations of cities of 100,000 or more inhabitants the powers and functions as therein enumerated and provided, in addition to those embraced in and provided for by said act of 1871. It is a settled proposition that a statute which classifies cities or other localities, to be governed by its provisions, by a given or fixed population "according to the last United States census", will be held to apply to all other cities or localities which under any federal census in the future may pass into such class. The expression "last United States census" employed by the legislature in such a statute will be considered to refer to the last census preceding the enactment of the law, and to each succeeding census as it occurs, and, under such circumstances, the law will be held to be of a general character, and not of a special or local nature. *City of Indianapolis v. Narin*, 151 Ind. 139, 146, 41 L. R. A. 337; *Boyd v. City of Milwaukee*, 92

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Wis. 456, 66 N. W. 603; *Johnson v. City of Milwaukee*, 88 Wis. 383, 60 N. W. 270; *Campbell's Appeal*, 132 Pa. St. 257, 19 Atl. 219, 7 L. R. A. 193; *Fellows v. Walker*, 39 Fed. 651.

That the law in question was intended by the legislature to be general is fully disclosed by section thirty-three, whereby it is declared in effect that the provisions of the act shall apply to and govern any city which at the time of its passage had not attained to the population provided, when according to any federal census in the future such city may be shown to have reached the required population. The statute in question, under its provisions, is made applicable to to any and all cities which measure up to the standard of population therein fixed, as disclosed by the last federal census preceding its passage, and also to any city or cities as may be shown to have the necessary population according to any federal census in the future. The fact that the city of Indianapolis is the only one of the grade mentioned to which the law in dispute can have a present application will not alone be sufficient to condemn it as a special statute.

Counsel for appellants assert that under the provisions of section four in relation to the election of commissioners provided for by this act, it is made special legislation. This section begins as follows: "At the city election occurring on the second Tuesday of October, 1899, five members of the board of school commissioners shall be elected to serve as herein provided." It is said that there is no city in this State other than Indianapolis which held an election on the second Tuesday of October, 1899. The fact that the city of Indianapolis is the only one to which this provision was applicable certainly would not alone serve to render the entire act special when by its other terms and provisions it is disclosed that it was intended to be applicable generally to all cities subject to its operation or control. Without further comments we conclude that the act of 1899 is in its nature a general law, and is therefore not invalid by reason of the objections urged by appellants.

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The question next presented for determination relates to the operation and effect of the provisions embraced in that part of section one indicated by our italics. As previously affirmed, there can be no question as to the jurisdiction of the legislature to legislate upon the subject of common schools and to confer the powers which, as claimed, were attempted to be conferred upon appellee's predecessor under the act of March 3, 1871, and acts connected with or supplemental thereto. The infirmity imputed to these acts is that of special legislation in violation of the constitutional provision to which we have previously referred. There was no want of power, as we have seen, upon the part of the State, by proper legislation, to confer the authority upon the school corporation of the city of Indianapolis to borrow money for school purposes and to issue its bonds to secure a loan so obtained. Appellants, under their complaint, may be said to admit that the board of school commissioners, which issued the bonds of 1890, was elected and organized under the law of 1871, and at least assumed to act, in the issue and sale of these obligations, under color of its authority. The board, elected and acting under the provisions of that statute, was, to say the least, a *de facto* board if not *de jure*, and its acts thereunder, if invalid, are, under the circumstances, subject to ratification or confirmation by the lawmaking power.

The rule in respect to the operation or effect of a curative or ratifying statute in such cases is stated by a leading authority as follows: "Such subsequent ratification may not only legalize the existence of a corporation formed without authority of law, and authorize the association to act in a corporate capacity thereafter, but it may also cure the illegality of corporate acts performed before the act of ratification was passed, and render such acts as valid and binding as if authority to perform them had been previously granted by the legislature." 1 Morawetz on Priv. Corp. §20.

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That such ratifying acts are entitled to much favor and respect upon the part of the court, in the absence of any constitutional inhibition, is certainly true, especially if the effects thereof are in harmony with equity, justice, and public policy. Such remedial action upon the part of the State, through its legislature, is of the same and equal import in all respects as though authority had originally been granted by the State to perform the act sought to be legalized.

That the declaration embraced in section one of the act of 1899, to the effect that appellee, the present board of school commissioners of the school corporation of the city of Indianapolis, "shall assume, pay, and be liable for all the indebtedness and liabilities of boards of school commissioners under the above described acts" is applicable to the school bonds involved in this action can not, in our judgment, be successfully controverted. It may also be affirmed that this provision had the force and effect, under the circumstances, of curing all of the defects or infirmities claimed to exist in respect to the issue and sale of these bonds, by reason of the alleged invalidity of the statute of 1871. It is the command of the State, the principal, through its legislature, to appellee, as its agent, to assume and pay the indebtedness evidenced by these bonds issued under the circumstances heretofore stated. Under the authority of this remedial provision of the act in controversy, these bonds must be held to be the valid obligation of the school corporation of the city of Indianapolis, for the payment of which it is liable; and it is incumbent upon appellees to discharge the duty of paying them. See *Schneck v. City of Jeffersonville*, 152 Ind. 204, and authorities there cited. *Burget v. Merritt*, ante, 143, and cases there cited.

Appellants next insist that the bonds in controversy are invalid for the reason that at the time of their issue and sale the indebtedness owing by the school corporation and the civil corporation of the city of Indianapolis was in

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excess of the limit prescribed by article thirteen of the State Constitution. This amendment to our Constitution was adopted on March 14, 1881, and, so far as it is material to the question as here presented, reads as follows: "No political or municipal corporation in this State shall ever become indebted, in any manner or for any purpose, to an amount, in the aggregate exceeding two *per centum* of the value of the taxable property within such corporation, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness; and all bonds or obligations, in excess of such amount, given by such corporation, shall be void."

It is urged with much earnestness by appellants' learned counsel that the bonds in issue in this action must, in obedience to the above constitutional mandate, be held to be void because at the time of their issue the aggregate existing indebtedness of the school city and civil city of Indianapolis was, as shown by the facts alleged in the complaint, in excess of two per cent. of the taxable property within such civil city. The argument of counsel, as we view it, seems to be that the language "no political or municipal corporation * * * shall ever become indebted * * * to an amount in the aggregate exceeding two *per centum*" must be interpreted to refer to an aggregation of debts of any two or more political or municipal corporations having an existence within the same territorial limits. It is contended that the debts of each of such corporations must be aggregated in estimating the debt limit of any one of them under this provision of our Constitution. It is further contended that the board of school commissioners created by the act of 1871 was but an agency through which the civil city of Indianapolis was to exercise the power of managing its common school affairs.

Since 1852, school corporations, for conducting and managing the affairs of our free common schools, have been continuously in existence in this State. We have previously

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seen that under section four of the school law of 1865, enacted at least sixteen years prior to the adoption of this amendment to the Constitution, "each incorporated town or city" was declared to be a distinct municipal corporation for school purposes. In *Root v. Erdelmeyer*, 37 Ind. 225, decided in 1871, nearly ten years before the adoption of the amendment in question, this court, by Worden, J., in construing this provision of the school law of 1865, said: "To be sure, 'each civil township and each incorporated town or city in the several counties of the State is hereby declared a distinct municipal corporation for school purposes.' 3 Ind. Stat. 441, §4. Thus each civil township in the State, as well as each incorporated city and town, is made an instrumentality by means of which the educational purposes of the State are carried out. But when taxes are assessed by means of these instrumentalities for building schoolhouses, they are assessed for school or educational purposes, and not for municipal purposes."

In fact it has been universally held by this court in a long line of cases, quite a number of which were decided prior to the adoption of the debt limit amendment to our Constitution, that a municipal school corporation created by the act of 1865, within the territorial limits of a township, incorporated town, or city, was by the provisions of that law made as distinct and separate a corporation or legal entity, in respect to the civil corporation, as though they each existed in entirely different territory. Each corporation was held to be possessed, according to law, of its own rights, and each was subject to the liabilities which it had legally incurred, and an action could not be maintained against one for the debts or liabilities of the other. *Utica Township v. Miller*, 62 Ind. 230, and cases cited; *Carmichael v. Lawrence*, 47 Ind. 554; *McLaughlin v. Shelby Tp.*, 52 Ind. 114; *Sims v. McClure*, 52 Ind. 267; *City of Huntington v. Day*, 55 Ind. 7; *Town of Noblesville v. McFarland*, 57 Ind. 335; *Greensboro Tp. v. Cook*,

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58 Ind. 139; *Harrison Tp. v. McGregor*, 67 Ind. 380; *Hornby v. State*, 69 Ind. 102; *State v. City of Terre Haute*, 87 Ind. 212; *Fatout v. Board, etc.*, 102 Ind. 223, 230; *Middleton v. Greeson*, 106 Ind. 18; *Jarvis v. Robertson*, 126 Ind. 281; *Braden v. Leibenguth*, 126 Ind. 336; *Wilcoxon v. City of Bluffton*, 153 Ind. 267.

This was the exposition or construction of this provision of the school law of 1865 by the highest court of this State at and prior to the ratification of the constitutional amendment of 1881. It may at least be presumed that the people or electors of this State, at the time they ratified this amendment and thereby made it a part of our fundamental law, were familiar with the exposition or construction given by this court in respect to the nature or character of these distinct municipal school corporations, and, in the light afforded by this provision of the law of 1865 and the construction placed thereon, they ratified the amendment in question and intended that it should apply to such municipal school corporations in like manner as it was intended to apply to civil corporations.

It is a rule generally asserted that the terms or words of a constitution, depending upon ratification by the people, should be interpreted in a sense most obvious to the common understanding at the time of its adoption, in the belief that such was the sense or meaning designed by such terms or words. In truth it is a well settled principle that the paramount object or purpose of all construction or interpretation in respect to written laws is to discover or ascertain the intention of such laws. *Bishop v. State*, 149 Ind. 223, 39 L. R. A. 278, 63 Am. St. 279; *Storms v. Stevens*, 104 Ind. 46; *Stout v. Board, etc.*, 107 Ind. 343. Guided by this rule, in the light of the circumstances as they existed at the time the amendment in question was engrafted upon our fundamental law, we are led to conclude that it must have been the common understanding of the proposers and rati-

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fiers of this constitutional amendment that the words "political or municipal corporations", as therein contained, were intended and designed to mean and apply to municipal corporations created or organized for school purposes. The declaration 'no political or municipal corporation in this State' certainly by its plain terms was, to say the least, intended by the framers and ratifiers thereof to refer to and control all municipal corporations existing at the time of its adoption. As to whether it was intended to apply to and regulate such as might thereafter be created is a proposition not necessarily involved in this action. That the prohibition declared by the Constitution under its plain language was intended to apply singly to the indebtedness of each corporation, and not to the indebtedness in the aggregate of two or more corporations, notwithstanding the fact that they might exist and be included in the same territorial limits, in our opinion can not be successfully controverted. In fact it would be difficult to conceive how plainer language than that used by the framers of this amendment could have been employed to design or indicate its meaning.

The argument of appellants to the effect that in 1890 and 1900 there existed within the corporate limits of the city of Indianapolis but one corporation, which was the civil city of Indianapolis, and that, under the laws of 1871 and 1899, heretofore considered, the legislature simply prescribed, in regard to such, different functionaries, to discharge different functions, and, inasmuch as there was but one municipal corporation, the civil city, and as the indebtedness created by the bonds issued in 1890 and now sought to be refunded was in excess of the limit fixed by the Constitution, such indebtedness is therefore void, is not supported by law, and may be said to be a species of unsound logic. That, under the act of 1899, the legislature recognized the school city existing within the territorial limits of any civil city to which such act was applicable, and thereby legislated in reference to such school city, is

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made evident by the frequent mention of the school city in that statute.

Equally untenable is their argument whereby they concede that it may be true that a school city is a distinct municipal corporation, but contend that it is only an agency of the civil city to discharge the functions of the latter in respect to the affairs of common schools. It is established by the decisions of this court heretofore cited that this proposition is not true. The government or management of our free common schools, as it has been frequently affirmed by this court, is a matter of State concern, and the various school corporations and school boards are, as a general rule, the agencies of the State in this respect for executing its functions. As well said by counsel for appellee, if one sustains the relation of agent to another, it must be with reference to some matter which pertains to or concerns the principal.

Counsel for appellants also advance the claim that if the amendment in question is not interpreted to be a prohibition as against two or more corporations, in the aggregate, within the same territory, then, under such circumstances, the legislature might create civil corporations within the boundaries of an incorporated civil city for the purpose of performing some of the functions which under the law devolved upon the latter. One of these corporations so created, it is claimed, might be for fire purposes, and one for park purposes, another for sanitation purposes, and each alone be permitted to contract an indebtedness to the limit provided by the Constitution, and by this method it is asserted that the legislature might attempt to evade the prohibition of the constitutional provision or virtually render it of no effect by the multiplication of municipal corporations.

We can not assume that the legislature will disobey the organic law of the State, or will ever attempt to create other corporations within existing incorporated towns or cities for the redistribution of the powers or functions of such

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municipalities, in order to evade the restriction in respect to the debt limit in our Constitution. If legislation to this effect should be passed in the future, a proper case, no doubt, will be presented for the decision of this court, and the question may then be determined.

We have heretofore said in this opinion that the indebtedness, the payment of which is sought herein to be enjoined, is the indebtedness and liability of the school corporation of the city of Indianapolis, and not the indebtedness or liability of the civil city, and the former, and not the latter, is obligated to pay it.

A debt is defined to be, in its general sense, a specific sum of money which is due or owing from one person to another, and denotes not only an obligation of the debtor to pay, but the right of the creditor to receive and enforce payment. *Board, etc., v. Harrell*, 147 Ind. 500, and cases there cited.

In the case last cited it is said: "The mere fact that the boundaries of the taxing district and the township are the same, and that the property within those boundaries is liable to be assessed with benefits according to its value, does not make the bonds a debt of the township."

The board of school commissioners, which contracted the indebtedness here involved, was not empowered, under the law, to make it a liability of the civil city, and the latter is in no sense the debtor, and the payment thereof, under the circumstances, can not be enforced against it. It must surely follow, under such circumstances, that it can not be held to be an indebtedness which, under or within the meaning of the amendment in question, must be considered and taken into account in order to ascertain whether the civil city of Indianapolis is within the debt limit as therein fixed. The bonds in dispute, as we have stated, constitute an indebtedness of the school corporation, hence they must be estimated and taken into account in determining the question as to whether such school corporation has become indebted in excess of the amount to which it is limited by the Constitution.

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We conclude and hold, under the interpretation which we place upon the constitutional provision in controversy, that the debts of the civil city of Indianapolis and those of its school corporation are not to be aggregated to determine the debt limit to which either may be entitled under the Constitution, but that the right or power of each of these corporations to contract an indebtedness not in excess of the limit fixed by the Constitution is affected only by its own existing debts. We are supported in this conclusion by the following decisions, arising out of constitutional provisions of sister states similar to and of like character of the one involved in this action: *Wilson v. Board, etc.*, 133 Ill. 433, 27 N. E. 203; *State v. Common Council, etc.*, 96 Wis. 73, 71 N. W. 86; *Board, etc., v. National Life Ins. Co.*, 94 Fed. 324, 36 C. C. A. 278; *Todd v. City of Laurens (S. C.)*, 26 S. E. 682.

In *Wilcoxon v. City of Bluffton*, 153 Ind. 267, the majority of this court held that the legislature, by the act of 1873, had imposed the duty or burden upon civil cities, like Bluffton, of issuing and negotiating bonds to obtain funds to be used for the erection of school buildings, and that such bonds constituted an indebtedness of the civil city alone for which it was liable, and therefore must be estimated and considered in ascertaining whether its indebtedness was in excess of this constitutional limit. The decision in that appeal in no manner conflicts with the holding in the case at bar as the distinction is obvious.

It follows, from the conclusions which we have reached, and we so adjudge, that the bonds in controversy in this action are valid obligations of the school corporation of the city of Indianapolis, for the payment of which such school corporation is liable; and that the payment or refunding of these bonds can not be enjoined under the facts alleged in the complaint.

The demurrers to the complaint were properly sustained, and the judgment below is therefore affirmed.

Monks and Dowling, JJ., dissent.

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CONCURRING OPINION.

BAKER, C. J.—I hold that the bonds in question are the bonds of the school city of Indianapolis because I find, as stated in my dissenting opinion in *Wilcoxon v. City of Bluffton*, 153 Ind. 281, *et seq.*, (1) that the legislature had constitutional authority to create school corporations, which should be within or should cover the territory occupied by preëxisting civil corporations, and which should be separate and distinct from the civil corporations; (2) that the legislature did create such separate and distinct school corporations, of which the school city of Indianapolis was and is one; (3) that the school corporation and the civil corporation, which cover the same territory, are as separate and distinct in their powers, rights, and duties as if they were in widely separated localities in the State; (4) that neither the school corporation nor the civil corporation can exercise any of the functions of the other; (5) that the control of all school affairs including the erection and maintenance of school buildings is exclusively the function of the school corporation; (6) that any officers, no matter what their titles or other official duties may be, who are required by law to take part in exercising any of the functions that appertain to a school corporation, do so necessarily as an agency of the school corporation; (7) that neither the school corporation nor the civil corporation can be made to assume and pay any of the liabilities of the other; (8) that indebtedness for the erection of school buildings is necessarily the exclusive liability of the school corporation; (9) that bonds to provide money for school purposes, which are payable exclusively out of the revenues of the school corporation, are necessarily the bonds of the school corporation; and (10) that any officers, no matter what their titles or other official duties may be, who are required by law to do anything in relation to the issuance of such bonds, do so necessarily as an agency of the school corporation.

I concur in the result in this case because I am convinced

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that the foregoing propositions are correct and are controlling on the main question. But if I could become satisfied that the opinion in the Wilcoxon case was sound, I should be unable to vote for an affirmance of this case. If, in the smaller cities, the trustees of the school corporation, in receiving the consideration for which the bonds are issued and in filing the report on which the bonds are based and without which the bonds can not lawfully be issued, act as an agency of the civil corporation, I see no valid reason why the school commissioners of the larger cities should not also be held to be a mere agency of the civil corporation. If A incurs a personal liability for C's purchases by signing and issuing to B a bond which on its face shows that the money is borrowed of B to pay for C's purchases and is turned over to C, and A is signing the bond to B at C's request, that A pledges only the property of C for the repayment of the loan, and that B agrees that payment shall be made exclusively from C's moneys,—then A or any one else might as well be held liable for any and all of C's indebtedness. For, if an agent of a disclosed principal may be held to be the obligor, there should be no difficulty in holding a stranger to be an agent.

In the larger and in the smaller cities, the school corporation was created by the same general law. Bonds for school purposes by different statutes are expressly authorized in all cities. The fact that different agencies for the issuance of school bonds are appointed for differently sized cities can not change the obligor. And yet, by the two decisions, the taxpayers have the result that school bonds issued to pay for school buildings are in small cities the obligations of the civil corporation and in large cities the obligations of the school corporation, though in both instances the buildings are the exclusive property of the school corporation and the bonds are payable only from the moneys of the school corporation. If, by construction, any class of taxpayers should be guarded against a *four* per cent. limit of

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indebtedness, a glance at the history of municipal government ought to induce the belief that the taxpayers of the larger cities need that protection. But, nevertheless, the present result is reached, though all statutes on the subject, in respect to all cities, are parts of the "school law" of the State; though the primary rules of interpretation require all statutes on the same general subject to be construed as harmonious parts of a consistent system; and though the legislature, in obedience to the mandate of the Constitution, created all school corporations as instrumentalities of the State in order to provide for a general and uniform system.

THE SHELBY COUNTY COUNCIL ET AL. v. THE STATE,
EX REL. THE SCHOOL CITY OF SHELBYVILLE.

[No. 19,881. Filed June 20, 1900. Rehearing denied June 29, 1900.]

SCHOOLS.—*Indigent Children.*—*Aid by County.*—*Mandamus.*—An action cannot be maintained by the State on the relation of a school city to compel the county officers to make an appropriation for the benefit of indigent children under the act of 1899 (Acts 1899 p. 547), where the school city had furnished no temporary aid and had filed no list with county auditor of children aided.

From the Shelby Circuit Court. *Reversed.*

E. W. McDaniel, for appellants.

K. M. Hord and *E. K. Adams*, for appellee.

DOWLING, J. —The object of this proceeding was to obtain a writ of mandate against the Shelby county council, the board of commissioners of the county of Shelby, and the auditor of Shelby county, to compel the performance of certain acts alleged to be specifically enjoined by law. The action is founded upon an act of the General Assembly of this State, entitled "An act amending an act concerning the education of children, approved March 8, 1897, and declaring an emergency," approved March 6, 1899 (Acts 1899, p. 547), and particularly section six of that statute, which is in these words:

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"Sec. 6. If any parent, guardian or custodian of any child or children is too poor to furnish such child or children with the necessary books and clothing, with which to attend school, then the school trustee of the township, or the board of school trustees or commissioners of the city, or incorporated town where such parent, guardian or custodian resides, shall furnish temporary aid for such purpose, to such child or children, which aid shall be allowed and paid upon the certificate of said officers by the board of county commissioners of said county. Such township trustee or board of school trustees or commissioners, shall at once make out and file with the auditor of the county *a full list of the children so aided*, and the board of county commissioners, at their next regular meeting, shall investigate *such cases* and make such provisions for *such child or children* as will enable them to continue in school as intended by this act."

The act elsewhere provides that all children between the ages of six and fourteen years, with certain exceptions, shall attend school each year for a term or period not less than the term or period of the public schools, and imposes a penalty upon parents, guardians, and custodians of children of school age who fail to comply with the requirements of the said act in this respect.

The petition and motion for the alternative writ was filed in the name of the State of Indiana, on the relation of the school city of Shelbyville. It does not appear that an alternative writ was issued, or that any return was made to such writ. Demurrers to the petition were filed by the several defendants, and were overruled. No further pleadings were filed, and the court rendered judgment in favor of the petitioner, and awarded a peremptory writ of mandate, requiring the board of commissioners, the county council, and the auditor, respectively, to make estimates of the amount necessary to furnish books and clothing for the children of poor parents, guardians, and custodians; to make the ap-

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propriations for the payment of the same, and to draw proper warrants upon the funds so appropriated.

From that judgment, the defendants below appeal, and they separately assign as error the rulings on the several demurrers.

The material facts stated in the petition or complaint are these: The relator is the school corporation of the city of Shelbyville, and is situated in Shelby county, Indiana; the county council, and the board of commissioners of the county of Shelby, respectively, are composed of the persons named in the petition; during the year preceding the filing of the petition, there were 1,139 children between six and fourteen years of age residing in said school city, attached to its schools, and entitled to school privileges; among these are at least twenty children who, since January 1, 1900, have been without the necessary books and clothing with which to attend school, and whose parents, guardians, and custodians are too poor to furnish such necessary books and clothing; the term of school for the present school year will continue until May 25, 1900; the term of the schools for the next school year will begin on or before September 15, 1900, and will continue at least nine months thereafter; from the present time until January 1, 1901, more than 100 children who are entitled to attend the public schools will need books and clothing to enable them to attend such public schools, and the parents, guardians, and custodians of such children are too poor to furnish such books and clothing; it will require, for the purpose of furnishing such necessary books and clothing for the indigent children of said school city of Shelbyville for the residue of the year 1900, the sum of \$500, as petitioner is informed and believes; the board of commissioners of said county did not before the Thursday following the first Monday in August, 1899, nor at any time before or since, prepare, or attempt to make, any estimate, or itemized statement, of the amount of money which would be required for the year 1900 for

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the purchase of such necessary books and clothing, or append to any such estimate a verified certificate as required by law, but has failed, neglected, and refused to do so; said county council did not, at their meeting for the purpose of making appropriations, on the first Tuesday after the first Monday in September, 1899, or at any time before or since, make any appropriation of money to be paid out of the county treasury to reimburse the said school city of Shelbyville for any temporary aid it might furnish to such indigent pupils for the purposes aforesaid for the year 1900, although the members of said county council and of said board of commissioners at all times had full personal knowledge of the facts aforesaid, and of the needs and demands, present and prospective, of the indigent pupils aforesaid; said council and board deny that said county is liable to reimburse said relator for any moneys expended, or to be expended, in furnishing the temporary aid aforesaid, and, although demand has been made upon them, they refuse to make the estimates and appropriations aforesaid, on the ground that no such liability exists, and, unless ordered by the court, they will not make said estimates and appropriations; by reason of the facts aforesaid, an emergency exists for an immediate estimate and appropriation on the part of said board and council, and the members thereof, and a failure to make such estimates and appropriations will deprive said indigent children of the privilege of attending the common schools of said school city because of their need of suitable books and clothing; said auditor has failed and neglected to call a session of said council, or said board of commissioners, for the purpose of making said appropriations and itemized estimates, and will refuse to do so unless ordered by the court. Prayer for an alternative writ of mandate against the county council, and board of commissioners, and the members thereof, and against the auditor, to show cause, etc., and on the final hearing for a peremptory writ to compel said defendants, and each of them, to perform their respective duties in that behalf.

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The petition contains further allegations as to other school townships, but they are foreign to this controversy, and need not be noticed.

No right of action, such as is claimed here by the relator, is conferred by any provision of the act concerning county business approved March 3, 1899. (Acts 1899, p. 343.) If it exists at all, it must be derived from section six, of the act of March 6, 1899. (Acts 1899, p. 550.) But that section requires the school city, the school trustee of the township, or the commissioners of the city, to furnish *temporary aid* to children in their respective school corporations, whose parents, guardians, or custodians are too poor to furnish them with the necessary books and clothing to enable them to attend the public schools, and it directs that the aid so furnished shall afterwards be allowed and paid, upon the certificate of the said officers by the board of county commissioners. This part of the section evidently contemplates nothing more than the reimbursement of the school city, school trustee, or city commissioners, for moneys properly laid out by them in furnishing books and clothing to the children of poor parents, etc. The succeeding clause of the section makes it the duty of such board of school trustees, township trustee, or city commissioners, to make out and file with the auditor a list of the children so aided, and it declares that the board of commissioners, at their next regular meeting, shall investigate such cases, and make such provisions *for such child or children so aided, and named in the list so furnished*, as will enable such child or children to continue in school as intended by the statute. If no temporary aid has been furnished by the school city, trustee, or city commissioners, or if no list of the children so aided has been filed with the auditor, the board of commissioners has no duty to perform, nor any power to act.

It is not averred in the petition or complaint that the relator furnished any temporary aid to poor children within its

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limits, or that any list of children aided by it was filed with the auditor. It follows that the board of commissioners had nothing to act upon, and that neither the board, the county council, nor the auditor, has failed to perform any act specially enjoined by law, or any duty resulting from the office, trust, or station, or either of them. The act in question does not lay upon the board of commissioners the duty of ascertaining the names of the children for whom books and clothing should be furnished. That duty, in the first instance, seems to be imposed upon the board of school trustees, township trustee, or city commissioners, who are to furnish temporary aid, and then file the names of the children so aided. Only the children so aided and listed are entitled to the provision the board is enjoined to make.

Whether an action to compel the board of commissioners to make an appropriation for the benefit of such needy children can, under any circumstances, be maintained by the State on the relation of the school city, or not (a point we do not decide) it is clear that such a proceeding does not lie where the school city has furnished no temporary aid, and has filed with the auditor no list of children so aided. In determining the meaning of a statute, we are compelled to look first to its terms, and when these are plain and unambiguous the act cannot be extended to cases which do not justly fall within its scope.

For the error of the court in overruling the demurrers to the petition, the judgment is reversed, with instructions to sustain the demurrers, and for further proceedings in accordance with this opinion.

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155	406
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THE CITY OF INDIANAPOLIS ET AL. v. HOLT.

[No. 19,891. Filed July 10, 1900.]

MUNICIPAL CORPORATIONS.—Street Improvements.—Constitutional Law.—Indianapolis Charter.—The provisions of the act of 1891, as amended by the act of 1895 (Acts 1891 p. 137, Acts 1895 p. 384), relative to street improvements in cities having a population of more than 100,000 inhabitants are not violative of articles 5 and 14 of the amendments of the United States Constitution, or §21 of the Bill of Rights of the Constitution of the State of Indiana, as authorizing the taking of private property for public use without due process of law, and without just compensation therefor, since §78 of said act gives the property owner the right to be heard, and §75 furnishes an additional safeguard by requiring liens for street improvements to be enforced only by suit to foreclose in a court of competent jurisdiction, and authorizes the owner, who has not signed a waiver, to contest in such suit the amount of his assessment. *pp. 226-239.*

SAME.—Street Improvements.—Assessment.—Front-Foot Rule.—Indianapolis Charter.—The assessment for street improvements by the front-foot rule, as provided by §74 of the act of 1895 (Acts 1895 p. 384), is to be treated as *prima facie* correct, but is not exclusive of the right to have an assessment made according to benefits. *pp. 235-240.*

PLEADING.—Municipal Corporations.—Street Improvements.—The sufficiency of a complaint attacking the validity of a statute and a street improvement resolution based thereon must be determined by reference to the provisions of the statute, and not by the character of its averments concerning the resolution. *p. 241.*

From the Marion Superior Court. *Reversed.*

J. W. Kern, J. E. Bell, B. K. Elliott, W. F. Elliott and F. L. Littleton, for appellants.

J. W. Holtzman and L. A. Coleman, for appellee.

DOWLING, J.—In this suit, the validity of the statute relating to the improvement of streets in cities in Indiana, having a population of 100,000 or more is assailed, on the ground that it violates the provisions of articles five and fourteen of the federal Constitution, and section twenty-one of the Bill of Rights of the Constitution of the State of

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Indiana, by authorizing the taking of private property for public use without due process of law, and without just compensation therefor.

The action was brought by the appellee against the city of Indianapolis, and its board of public works, to enjoin the letting of a contract for the improvement of one of the public streets of said city. The separate demurrers of the appellants to the complaint were overruled, and judgment was rendered against the defendants below upon the demurrers. From that judgment the city and the board of public works appeal. The errors assigned are the rulings of the court upon the several demurrers.

It appears from the complaint that the appellee is the owner of lot number thirty-seven, in Highland Place addition to the city of Indianapolis; and that said lot abuts on Highland Place, a public street running north and south through said addition, the said street being within the limits of the said city; that the appellant, the city of Indianapolis, is a municipal corporation organized under an act of the General Assembly of the State of Indiana concerning the incorporation and government of cities having more than 100,000 population according to the last preceding United States census, approved March 6, 1891, and the acts of said General Assembly subsequently enacted amendatory thereof, and that said other defendants are the duly appointed, qualified, and acting members of the board of public works of said city. That the said board of public works, in the name and on behalf of said city, did, on the 14th day of March, 1900, adopt a resolution providing for the permanent improvement of the roadway of said Highland Place to a width of fifty-two feet from the south line of Twenty-first street on the north, to the south line of said Highland Place addition on the south, with creosoted wooden blocks; that said Highland Place, between said points, is of the uniform width of seventy-two feet from property line to property line, and that said roadway is

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of a uniform width of fifty-two feet from curb to curb; that said board, thereafter, caused notice of such resolution to be published in the Indianapolis Sentinel, a daily newspaper of general circulation in said city, once each week for two weeks, the last of which publications of said notice was made on the 21st day of March, 1900; that said notice named the 2nd day of April, 1900, as the day on which said board would receive and hear remonstrances from persons interested in, or affected by, said improvement; that no remonstrances were filed by any person, and that final action was then and there, on said second day of April, 1900, taken by said board confirming said original resolution without modification; that after ten days had elapsed from the time of taking such final action, to wit, on the 13th day of April, 1900, said board appointed three disinterested resident freeholders of said city as appraisers, who proceeded to appraise the property, exclusive of improvements thereon, abutting on said Highland Place between the terminals of said proposed improvement, and filed their said appraisal with said board; that the cost of said appraisal was thereupon added to the cost of the said proposed improvement, and that the total cost of said improvement, if made, will be less than twenty-five per cent. of the aggregate appraised value of the property abutting on said part of said street proposed to be improved; that said board thereupon advertised for sealed bids for said improvement, to be received on April 27, 1900, pursuant to said resolution, and according to the plans and specifications adopted by said board; that, on said 27th day of April, 1900, several bids were submitted to and opened by said board to improve said street with various kinds of creosoted wooden blocks, being the kind of blocks intended to be used by said board; that said resolution, advertisement, plans, and specifications, provide for the receiving of bids for making said improvement at so much per running or front foot of lots on

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each side of said street, the cost of said improvement to be assessed against the abutting lots within the limits of said proposed improvement, without reference to the benefits to accrue to said lots, or any of them, and to be arbitrarily apportioned to, and assessed against, all of the lots along the line of said proposed improvement, at the same amount per running foot of said lots, regardless of the relative value per running foot of such lots, and without reference to the benefits accruing to said lots as compared with each other; that the lowest of said three bids is \$5.89 and the highest \$6.99 per running foot front on each side of said street; that there are eighty-two lots in said addition, and that all of them are of the same depth; that eighty of them are of the same width front and rear; that two are irregular in shape, and differ in size from said other lots; that the part of said street so proposed to be improved is intersected by another street of said city sixty feet in width; that still another public street, thirty-three feet wide, enters said Highland Place within the line of said improvement, but does not cross the same, and that a certain public alley in said city, twelve feet in width, enters said street within the line of said improvement, but does not cross the same; that by the terms of said resolution and proposed contract, one-half of the cost of paving said intersecting street, and one-half of the cost of paving said entering street, and one-half of the cost of paving said entering alley will be assessed *pro rata* against the lots abutting on that part of said Highland Place proposed to be improved, and the remaining one-half of the cost of said intersecting street and of said entering street and alley will be apportioned upon the lots abutting on said intersecting and entering streets and alley for such distance from said Highland Place as is provided by law; that appellants have not yet acted on said bids, but that they are threatening to, and will proceed to do so, unless restrained and enjoined by the order of the court.

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It is further alleged that said lots are of unequal value, some being worth more than others per front foot, both with and without the improvements thereon; that some of said lots are improved with costly buildings, while others are improved with much less valuable structures, and still others are wholly unimproved, and that they are in proportion to their areas of unequal frontage on said Highland Place; that the benefits accruing to appellee's property will not be as much as the benefits accruing to many of the lots, having the same frontage, belonging to other persons; that the only statute under which the appellants acted, or assumed to act, and under which they propose to act is the act of March 6, 1891, and the subsequent acts amending, and re-amending said amendatory acts; that said acts are invalid, unconstitutional, and void, and that the appellants ought not to be permitted to award said contract for the improvement of said street under the said resolution or bids.

The complaint does not allege that the value of the appellee's lots will not be enhanced to an amount equal to the cost of the proposed improvement assessable against them in this proceeding.

The propositions submitted by counsel for appellee in support of the complaint are these:

(1) The several statutes of the State of Indiana which, when taken together, are commonly known as the Indianapolis City Charter, in so far as the same relate to the improvement of streets, are in violation of section twenty-one of the Bill of Rights of the Constitution of the State of Indiana, and also in violation of the fifth and fourteenth amendments of the Constitution of the United States.

(2) The said charter provides for the taking of private property without just compensation.

(3) The said charter provides for the taking of private property without due process of law.

(4) The said charter provides for an unjust and unlawful exercise of the taxing power.

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(5) Whenever a local assessment upon an individual is not grounded upon and measured by the extent of his particular benefit, it is, *pro tanto*, a taking of private property for public use without any provision for compensation.

(6) The charter affords no opportunity to a property owner to be heard by any tribunal having jurisdiction or authority to determine the benefits before an assessment can finally be collected.

(7) The charter having prescribed a fixed method by which the board of public works shall make assessments, such board cannot do otherwise than to follow such fixed method.

(8) The provision of the charter that in any suit to foreclose the lien of an assessment any property owner may contest the amount of such assessment does not give the property owner the right to have such assessment fixed according to benefits.

(9) The provision of the charter that in any suit to foreclose the lien of an assessment the property owner may contest the amount of such assessment must be construed in connection with the other provisions of the charter.

(10) When that part of the charter providing for contesting the amount of an assessment in a foreclosure suit is construed in connection with the one fixing a rule by which the board of public works is required to make such assessments, then such provision for contesting the amount of the assessment is not broad enough to raise the question of benefits, but merely raises the question whether such board made any error in computing the amount of the assessment.

(11) The charter makes no provision for the payment, out of the general fund, of the cost of improvements in excess of benefits.

(12) The provision of the charter that in all suits to foreclose assessment liens the plaintiff shall recover the amount of the assessment, interest, and attorney's fees, is in conflict with that portion giving the property owner the

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right to contest the amount of the assessment. As one section negatives the other, neither has any validity.

(13) While the charter and what is known as the Barrett law both provide for a front foot assessment, they are widely different as to the rights of the property owner. The Barrett law provides for a hearing before a tribunal having authority to review, alter, or amend, the assessment on the basis of actual special benefits received, while the charter provides only for a contest as to the amount of the assessment.

The several provisions of the act in question (Acts 1891, p. 167), necessary to be considered, are the following:

“Sec. 57 (§6870 Horner 1897). The department of public works shall have for its head a board of three members, to be appointed by the mayor, not more than two of whom shall be of the same political party. * * * No member of said board shall have any authority to act on behalf of the same, except pursuant to an order of the board, regularly made at a meeting of the same, at which meeting a majority of said board shall have been present. All actions of the board shall be recorded by the clerk thereof, together with the record of the vote of each member, where the vote is not unanimous. The board shall make rules governing the time and place for holding regular and called meetings, and for giving notice thereof.”

“Sec. 59 (§6872 Horner 1897). The board of public works shall have power * * * to lay out, open, change, vacate, and to fix or change the grade of any street, alley, or public place within such city, and to design, order, contract for, and execute the improvement or repair of any street, alley, or public place within such city.”

“Sec. 62 (§6875 Horner 1897). All the expenses incurred or authorized by such board of public works shall be payable out of the general funds of such city appropriated to the use of such board and available for the particular purpose, except where this act specifically directs that

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the same is to be paid for by assessments against property holders."

"Sec. 63 (§6876 Horner 1897). Whenever the board of public works shall desire to appropriate or condemn, for the use of such city, any property, real or personal, or to open, change, lay out or vacate any street, alley, or public place within such city, including proposed street or alley crossings of railways in cases where the proposed street or alley is to cross a railway, it shall adopt a resolution to that effect, describing the property which may be injuriously or beneficially affected, and shall cause notice of such resolution to be published in some daily newspaper of general circulation in such city once each week for two weeks. Such notice shall name a date, after the last day of publication, at which such board will receive or hear remonstrances from persons interested in or affected thereby. Said board shall consider such remonstrances, if any, and thereupon take final action, confirming, modifying or rescinding their original resolution. Such action shall be final and conclusive upon all persons."

"Sec. 73 (§6886 Horner 1897). Whenever the board of public works shall order the improvement of any street, alley, sidewalk or other public place in such city, in whole or in part, it shall adopt a resolution to that effect, setting forth a description of the place to be improved, and full details, drawings and specifications for such work. Notice of such resolution shall be published, remonstrances heard, said original resolution modified, confirmed or rescinded, in the same manner as heretofore more specifically provided by this act with regard to the condemnation of property and the opening of streets. If such original resolution be confirmed or modified it shall be final and conclusive on all persons, unless within ten days thereafter, one-half of all the resident freeholders upon such street, alley, or proposed improvement, remonstrate against such improvement. In case of such remonstrance, the improvement shall not take place unless specifically ordered by an ordinance within

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nor shall any question as to the propriety or expediency of any improvement or work be therein made. A property owner who has not, or property owners who have not, signed a waiver or exercised or claimed the option to pay in instalments, may, however, contest the amount of his or their assessment, but where a property owner or property owners has or have exercised the option to pay in instalments and has or have signed a waiver or exercised the option to pay in instalments such property owner or owners shall be concluded thereby and shall not be permitted to set up any defense whatsoever."

Sections 78 and 81 provide for the deposit of the assessment roll with the treasurer, the preparation of what is called the local assessment duplicate, notice by the treasurer to each person affected by the same, and suit for the recovery of the amount due. The issue of street or public improvement bonds, payable out of the fund actually paid to and collected by the city on such account, in anticipation of the collection of such assessments, and the enforcement of the payment of the assessments evidenced by such bonds, by sale of the lands and lots liable therefor by the county treasurer, are also provided for. After the issue of such bonds, it is declared that no suit shall lie to enjoin the collection of any assessment, and that the validity of the same shall not be questioned, but that all property owners shall be conclusively estopped and precluded from assailing the effectiveness or validity thereof in any manner.

It will be observed that two opportunities to be heard, after full notice, are granted to the lot owner. Section 73 of the act of 1895 (Acts 1895, p. 400), contains the following: "Whenever the board of public works shall order the improvement of any street, * * * it shall adopt a resolution to that effect, setting forth a description of the place to be improved, * * *. Notice of such resolution shall be published, remonstrances heard, said original resolution modified, confirmed or rescinded, in the same

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manner as heretofore more specifically provided by this act with regard to the condemnation of property and the opening of streets."

That part of the statute which relates to the condemnation of property and the opening of streets, as has been seen, expressly declares that notice of such condemnation proceedings, describing the property which may be injuriously or beneficially affected, and fixing a date for the hearing of remonstrances from persons interested in, or affected thereby, must be given by publication in a daily newspaper of general circulation in such city, once each week for two weeks. The act further provides that remonstrances may be received from persons interested in, or affected by, such proceedings, and that the board of public works shall consider such remonstrances, and take final action upon them, confirming, modifying, or rescinding the original resolution.

Whenever a public street or alley is to be improved, the statute requires that notice of the resolution of improvement shall be published, remonstrances heard, such original resolution modified, confirmed, or rescinded, in the same manner as in the case of the condemnation of property and the opening of streets. Would the enforcement of this statute against the lots of the appellee in the proceeding to improve the street known as Highland Place street deprive him of his property without due process of law, or just compensation therefor? We think the question must be answered in the negative.

It has been held that due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. *Kizer v. Town of Winchester*, 141 Ind. 694; *Stuart v. Palmer*, 74 N. Y. 183; *Garvin v. Daussman*, 114 Ind. 429, 5 Am. St. 637; *Cooley on Const. Lim.*, 855; *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. ed. 569; 2 Kent's Com., 13;

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Wynehamer v. People, 13 N. Y. 378; *Rowan v. State*, 30 Wis. 129, 146; *Ex parte Ah Fook*, 49 Cal. 402; *People v. Board, etc.*, 70 N. Y. 228; *San Mateo v. Southern Pacific R. Co.*, 13 Fed. 722, 8 Am. & Eng. R. Cas. 1, 27.

In *Happy v. Mosher*, 48 N. Y. 313, 317, it is said with reference to "due process of law": "It need not be a legal proceeding according to the course of the common law; neither must there be personal notice to the party whose property is in question. It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is afforded him to defend."

In *Wurts v. Hoagland*, 114 U. S. 606, 5 Sup. Ct. 1086, 29 L. ed. 229, the constitutionality of a law of New Jersey, regulating the proceedings of the drainage of marsh lands, was under consideration. In deciding the case, the law was thus declared: "As the statute is applicable to all lands of the same kind, and as no person can be assessed under it for the expense of drainage without notice and opportunity to be heard, the plaintiffs in error have neither been denied the equal protection of the laws, nor been deprived of their property without due process of law, within the meaning of the fourteenth amendment of the Constitution of the United States. *Barbier v. Connolly*, 113 U. S. 27, 31, 5 Sup. Ct. 357, 28 L. ed. 923; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Hagar v. Reclamation District*, 111 U. S. 701."

In *Davidson v. New Orleans*, *supra*, Mr. Justice Bradley, in a concurring opinion, said: "I think, therefore, we are entitled, under the fourteenth amendment, not only to see that there is some process of law, but 'due process of law,' provided by the state law when a citizen is deprived of his property; and, that in judging what is 'due process of law,' respect must be had to the cause and object

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of the taking whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.' Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according as the laws, habits, customs, and preferences of the people of the particular state may require."

In re Ryers, 72 N. Y. 1, it is said: "Due process of law in the fourteenth amendment to the United States Constitution does not mean by a judicial proceeding." See, also, *McMillen v. Anderson*, 95 U. S. 37, 24 L. ed. 335; *Reagh v. Spann*, 3 Stew. (Ala.), 100, 108; *Risser v. Hoyt*, 53 Mich. 185, 201, 18 N. W. 611.

The statute under examination secures to each property holder, whose lot or land may be affected by the proposed improvement, notice of the proceeding, and the right to be heard before the board of public works by way of remonstrance; no assessment against a lot affected by the improvement can be enforced except by suit to foreclose it in a court of competent jurisdiction; and, in such suit, the property holder who has not signed a waiver of all defenses and irregularities, or exercised or claimed the option to pay in instalments conferred by the statute, is expressly authorized to contest the amount of his assessment.

It is contended, however, by counsel for appellee that the last mentioned provision of the statute authorizes only an inquiry as to the mathematical correctness of the assessment made upon the basis of the front-foot rule. It is argued that this must be so because the statute does not give to the property owner the right in such foreclosure suit to have the assessment made according to the benefits received by

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the separate lot, or expressly confer on the court the power to make an assessment on that basis. It is also objected that the statute fixes the sum of the recovery at the amount of the assessment, interest, and attorney's fees, and that this provision is inconsistent with the supposed privilege of contesting the amount of the assessment on the ground that it exceeds the special benefits received. The additional difficulty is suggested that, if the benefits should be found to be less than the cost of the improvement, no provision is made for the payment of the deficiency to the contractor.

In a proceeding of this kind, the one thing in which the property owner is more seriously interested than any other is the proportionate share of the burden of the cost of the improvement which may lawfully be imposed upon his lot or land. The constitutional principle which protects the lot owner from an assessment against his property in excess of the special benefits received by the lot from the improvement is a limitation and restriction upon the amount of such assessment. It does not require that statutes making provision for the improvement of streets and other public ways shall prescribe any particular mode of ascertaining and assessing benefits. If an assessment against a piece of land exceeds the special benefits received by the tract from the improvement, the principle referred to would prevent the collection of the excess of such cost over the benefits. If the statute under which the assessment was made prohibited or excluded the consideration of benefits, and the apportionment of the cost of the improvement with reference thereto, the rule would render such statute void. The principle involved is not a new one. The courts, generally, have recognized the proposition that such special benefit to the particular lot is the legal foundation of exactions for the construction of public improvements, which not only enhance the value of the abutting lots, but are beneficial to the public also. The unsettled point has been whether in making provision for the payment of the cost of such im-

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provement the legislature had the power to create, or authorize the creation of, a taxing district, and to declare, conclusively, that the property within its limits should be deemed benefited to the amount of the whole cost of the improvement, and in an equal ratio per front foot, and liable to assessment in that ratio; or, whether such assessments should be limited to the amount of the special benefits actually received by each separate lot or tract affected by the improvement. Until very recently, the power to create such taxing district, and to subject the property therein to the payment of the full amount of the cost of the improvement, was generally recognized, and even now many courts are reluctant to admit that such power may not be exercised without violation of the provisions of the Constitution protecting the owner of private property from unlawful exactions on account of such improvements. Assuming, however, that the correct rule is that the assessment for such improvements must be according to the benefits received by the property assessed, such a construction should be given the provisions of the statute under examination, if its language will authorize it, as will enable the court to uphold it. The right to contest the amount of the assessment, as we understand the statute, includes the right to show that the assessment is erroneous because it exceeds the sum of the special benefits received by the lot assessed. The words of the statute should receive a fair interpretation, and we cannot restrict the import of the clause "shall have the right to contest the amount of the assessment" to the correction of mere clerical mistakes, without doing violence to the letter and spirit of the act.

But, it is contended that, if the fact that the assessment upon the particular lot exceeded the benefits received by such lot should be judicially ascertained in such foreclosure suit, the court would be without authority to make a correct assessment founded upon special benefits, for the reason that no basis of assessment is authorized by the statute except

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what is known as the front-foot rule. In our opinion, this conclusion does not follow. Few of the powers which may be exercised by a municipal corporation are more important, or more necessary to the convenience and welfare of its citizens than the power to lay out, improve, and repair its streets and thoroughfares. This attribute is included in the grant of powers in every municipal charter whether general or special. It is a fundamental principle of statutory interpretation that the general grant of a power carries with it the right to employ the means essential to its legitimate exercise. The statute, under which the city of Indianapolis is incorporated, in its enumeration of the powers of the municipal government to be exercised through the board of public works, declares that the board shall have power "To lay out, open, change, vacate, and to fix or change the grade of any street, alley, or public place within such city, and to design, order, contract for, and execute the improvement or repair of any street, alley, or public place within such city." Acts 1891, §59 (Acts 1891 p. 167), §3830 Burns 1894, §6872 Horner 1897. The power 'to design, order, contract for, and execute the improvement' is the principal thing. The means by which the cost of the improvement is to be assessed and collected are secondary.

The lots and lands abutting upon the improvement are, unquestionably, subject to assessment on account of such improvement, and, under the rule spoken of, the only limitation upon such liability is that such assessment cannot lawfully exceed the amount of the special benefits received by such lots and lands. Any mode of assessment prescribed by the legislature, whether the front-foot rule or any other, is to be regarded as subject to this condition, and, unless inquiry into the question of special benefits is excluded or prohibited by the statute, such inquiry may properly be made by any tribunal before which the question of the collection of an assessment is brought.

Our conclusion is that the statute in question which se-

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cures to each property holder, whose lot or land may be assessed for the improvement of a street, notice of the proceeding, and the right to be heard by way of remonstrance against such improvement, together with the right to contest the amount of the assessment in any suit brought to enforce the same, sufficiently provides for the protection of the rights of the owners of the lots, and is not objectionable on the ground that it contravenes the fifth and fourteenth amendments of the Constitution of the United States, or the twenty-first specification of the Bill of Rights of the Constitution of the State of Indiana.

The ground of the judgment in *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. ed. 443, was stated to be: "That the assessment against the plaintiff's abutting property was under a rule which *excluded* any inquiry as to special benefits, and the necessary operation of which was, to the extent of the excess of the costs of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation."

The court say that: "The assessment was by the front foot and for a specific sum representing such cost, and that sum could not have been reduced under the ordinance of the village, even if proof had been made that the costs and expenses assessed upon the abutting property exceeded the special benefits. The assessment was in itself an illegal one because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one."

And further: "We have seen that, by the Revised Statutes of Ohio, relating to assessments, the village of Norwood was authorized to place the cost and expense attending the condemnation of the plaintiff's land for a public street on the general tax list of the corporation, §2263; but if the village declined to adopt that course, it was required by §2264 to assess such cost and expense 'on the abutting and

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such adjacent and contiguous or benefited lots and lands in the corporation, *either* in proportion to the benefits which may result from the improvement *or* according to the value of the property assessed, *or by the front foot* of the property bounding and abutting upon the improvement'; while by §2271, whenever any street or avenue was opened, extended, straightened or widened, the special assessment for the cost and expense, or any part thereof, 'shall be assessed only on the lots and lands bounding and abutting on such part or parts of said street or avenue, so improved, and shall include of such lots and lands only to a fair average depth of lots in the neighborhood.' It thus appears that the statute authorizes a special assessment upon the bounding and abutting property by the front foot for the entire cost and expense of the improvement, without taking special benefits into account. And that was the method pursued by the village of Norwood. The corporation manifestly proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whether such property was benefited or not to the extent of such cost."

The Ohio statute authorized the village to adopt an alternative proceeding which excluded the consideration of benefits. In the acts before us, we find nothing which forbids or excludes an investigation as to the special benefits, or which prevents an assessment on that basis. This court held in *Adams v. City of Shelbyville*, 154 Ind. 467, that the assessment by the front-foot rule, under the general law for the incorporation of cities, is to be treated as *prima facie* correct; but that it is not exclusive of the right to have an assessment made according to benefits. We are satisfied that this is the correct interpretation of the statutes now before us, and we discover nothing in this view of the law inconsistent with the principles stated in *Norwood v. Baker*. *Shroder v. Overman*, 61 Ohio St. 1, 55 N. E. 158; *Sears v. City of Boston*, 173 Mass. 71, 53 N. E. 138, 43 L. R. A. 834; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616;

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Hagar v. Reclamation District, 111 U. S. 701; *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. ed. 763; *Garvin v. Daussman*, 114 Ind. 429; *Reinken v. Fuehring*, 130 Ind. 382, 30 Am. St. 247; *Law v. Johnston*, 118 Ind. 261; *Kizer v. Town of Winchester*, 141 Ind. 694; *Adams v. City of Shelbyville*, 154 Ind. 467.

There is nothing in the provision that the amount of the recovery shall be the sum of the assessment, with interest and attorney's fees, inconsistent with the right to contest the amount of such assessment in the manner indicated in this opinion. The evident meaning of this clause of the statute is that the measure of recovery shall be such sum as may lawfully be assessed against the land with the interest and attorney's fees added thereto.

The question as to the payment to the contractor of the difference between the sum which may be collected on account of the assessments for the improvement, and the total cost of the work, does not arise in this case, and we do not feel called upon to decide it. Neither is it necessary for us to express an opinion upon the provisions of the statute in regard to the issue of improvement bonds in anticipation of the collection of the assessments.

Some of the averments of the complaint are very broad as to the character of the resolution passed by the board of public works providing for the improvement of the street, but the pleading does not attempt to set out the contents of that resolution, and these averments seem to be statements of conclusions only. The question of the sufficiency of the complaint in this respect must be determined by reference to the provisions of the statute, and not by the character of its averments concerning the legal effect of the resolution.

Judgment reversed, with instructions to sustain the demurrers to the complaint, and for further proceedings not inconsistent herewith.

Baker, C. J., and Hadley, J., dissent.

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DISSENTING OPINION:

HADLEY, J.—I find myself unable to agree with the majority in this case.

It was unanimously held by this court in *Adams v. City of Shelbyville*, 154 Ind. 467, that under the doctrine of the federal Supreme Court in *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. ed. 443, among the principles applicable to assessments for local improvements are the following: "Each parcel of contributing property may be assessed only to the extent that it actually receives special benefits; the taxing district as a whole may be assessed only to the extent of the sum of the special benefits actually received by the several parcels of contributing property; the improvement so far as its cost exceeds the special benefits resulting to the several parcels of property in the taxing district, is a benefit to the municipality at large, and such excess must be borne by the general treasury; property owners affected by an improvement, within a taxing district, are entitled to a hearing on the question of special benefits."

With much deference for the views of the majority, I am, after careful consideration, unable to reach the conviction that the Indianapolis charter is constructed upon a recognition of the foregoing principles. We are agreed that if an exaction for local improvements shall exceed the special benefits, to the extent of the excess, it is a taking of private property for public use without just compensation. We are also agreed that if the Indianapolis charter may be so construed as to give to assessing officers the power to grant a hearing upon the question of benefits, and upon such hearing the power to make or adjust assessments upon the basis of special benefits, then the law meets the requirements of the Constitution. The point of divergence is upon the true meaning of the statute, and involves two propositions: (1) Does it require the assessment of the total cost of an improvement upon the frontage equally per running

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foot without reference to the question of special benefits, and (2) does it give the property owners affected due process of law?

I submit that the first of these propositions should be answered in the affirmative, and the second in the negative. It should be borne in mind that prior to the decision in *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. ed. 443, December 12, 1898, and at the time the city charter was enacted, for more than forty years, it had been accepted as the law in this State, and in most states of the Union, as well as by the federal courts, that it was a proper exercise of legislative discretion to declare as matter of law that the special benefits accruing to property within a particular district by a local improvement was equal to the cost. And while the right to exact the total cost of an improvement from the abutters was uniformly made to rest upon special benefits received, yet the constitutional right of the legislature arbitrarily to declare the equality of burden and benefit had never been challenged, as it appears, in this State as being a denial of due process of law or as a taking of property without compensation, prior to the adoption of the charter. And excepting the act of 1889, commonly known as the Barrett law, which expressly provides for a hearing of persons aggrieved by equal frontage assessments, and the right of the common council to alter and change the frontage apportionment before final action upon the assessments, and except further the act of 1893 (Acts 1893, p. 202), relating to cities of 35,000 (Fort Wayne), which, possibly, by section 82, p. 245, provides a sufficient hearing, the legislation of this State has all been framed since 1852 in accordance with this view of the law, and street and alley improvements prosecuted thereunder. See R. S. 1852, p. 217, Acts 1857, p. 53, Acts 1865 (S. S.) p. 29, Acts 1867, p. 66, Acts 1893, with respect to cities of not less than 50,000 nor more than 100,000 (Evansville), p. 65.

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So when the charter was adopted the arbitrary front-foot rule had been maintained in this State for many years under the sanction of the Constitution, State and federal, so far as those instruments had then been interpreted by the courts of last resort, and the constitutional objections that have since arisen could not then have influenced the lawmakers. *Snyder v. Town of Rockport*, 6 Ind. 237; *City of Indianapolis v. Imberry*, 17 Ind. 175; *Goodrich v. Turnpike Co.*, 26 Ind. 119; *Bright v. McCullough*, 27 Ind. 223; *Palmer v. Stumph*, 29 Ind. 329; *Law v. Turnpike Co.*, 30 Ind. 77.

The ruling in *Adams v. City of Shelbyville*, 154 Ind. 467, lends no support to the Indianapolis charter in respect to the questions here involved. The charter has no such foundation to stand upon as the Barrett law. By the latter statute the common council is expressly authorized to pay any part of the cost of a street improvement from the general treasury. By the latter statute it is also expressly provided that the cost of an improvement shall be *estimated* by the front-foot rule; that, preparatory to the assessment by the common council, the city engineer shall apportion the cost per front foot and report his act to the council, and the council shall thereupon, after the publication of notice giving contents of report and fixing a time and place for the hearing of grievances, and having considered all grievances, approve such report, or change and alter the same as made on the frontage rule, and finally determine and fix the amount of assessment that each abutter shall pay.

These provisions of the Barrett law, which underlie the decision in *Adams v. City of Shelbyville*, *supra*, are wholly omitted from the charter, both in terms and principle. It is a familiar rule that the power to tax can be conferred only by statute and exercised only in the mode appointed therein.

Section 74 of the charter act (as amended Acts 1899, p. 558), provides: "If said board shall finally order such

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improvement, * * * and let the contract for the same, the cost of any street or alley improvement shall be estimated according to the whole length of the street or alley * * * per running foot, *and the total cost thereof * * * shall be apportioned upon the lands or lots abutting thereon * * **. Such city shall be liable to the contractor for the contract price of such improvement to the extent of the moneys actually received by such city from the assessments for such improvement * * * and the owners of property bordering on such street or alley shall be liable to the city for their proportion of the cost, * * * in the ratio of the front line of their land or lots, whether platted or not, owned by them, to the whole cost of the improvement."

There is nowhere in the law any shadow of authority for the board of public works, the only body having authority to make assessments, to change the method or basis of distributing the cost of an improvement from the frontage rule. With respect to the assessments, the board has no discretion, no right of judgment. The language conferring the power to make the assessments specifically directs how the power shall be exercised. The limit of their power and duty is to carry out the mandate of the legislature and to "apportion the total cost of the improvement upon the lands and lots abutting thereon", and having determined the cost of an improvement, by making a contract therefor, and ascertained, by measurements and mathematical calculations, the *pro rata* share of each abutter, to write down the several amounts as final assessments, showing in the roll thus made a description of each piece of property, the name of the owner and total *pro rata* assessment against each lot. When the assessment roll is thus completed the department of works shall prepare and deliver a duplicate thereof to the department of finance, and the duty and authority of the board of works in relation to the assessments is at an end. When the work is completed and approved by the

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action is had upon the resolution, the board is then required to prepare a roll of all property damaged or benefited by the opening of the proposed street, and names of owners, and shall thereupon assess the damages and benefits to each piece of property on said roll. Upon the completion of said assessments the board shall cause a written notice to be served upon the owner of each piece of property, showing the amount of the assessment and naming a place and time, not less than ten days, when the board will hear all persons feeling aggrieved on the question of the amount of the awards and assessments; and if such owner is a non-resident, notice shall be given by publication; and if a minor, the board shall by the proper proceeding procure the appointment of a guardian for such infant, and then serve such notice upon such guardian. And upon the day fixed the board shall hear all remonstrances and shall thereupon sustain or modify such awards and assessments; and any person feeling aggrieved by this final action of the board may within twenty days appeal from the board to the circuit or superior court, and such court shall hear the question of damages and benefits *de novo*, and confirm, lower, or increase the sum as it may deem just.

Upon completion of the assessment roll in this way the same shall be forthwith delivered to the department of finance, and the assessments from that time shall be a lien upon the property, superior to all liens except taxes. The department of finance shall at once prepare a duplicate of the assessment roll and deliver it to the city treasurer "and the duties of the treasurer and the department of finance, in respect thereto, shall be the same as are hereinafter more specifically prescribed with regard to assessments for street improvements."

By the language just quoted, it is obvious that the legislature had in mind, at the time, the method to be pursued in assessing the cost of a street improvement, a subject that next follows in the statute, and equally obvious from the

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foregoing provisions that it knew not only what is meant by a hearing as to benefits, but was capable of employing apt and suitable language in expressing that meaning. Can it be then that a legislature, feeling it expedient to provide in such elaborate detail for due process of law in respect to the opening of streets, in providing for the improvement of streets, after prescribing a definite and fixed rule for the guidance of assessing officers, a rule from which there can be no departure however apparent it may be to the assessing officers that under the rule the amount of an assessment is in excess of the benefits, should, in awarding due process of law, content itself with a single, isolated clause in a subsequent section, that, in suits to enforce the assessment made in the way commanded, the defendant "may contest the amount of the assessment"? To say that a hearing as to benefits in street improvement cases is contemplated by the act, as in street opening cases, is to admit the unanswerable question, Why did the legislature deem it proper and necessary so fully to prescribe it in one case, and omit it in the other?

It is also a familiar rule of construction that, when two inconsistent provisions appear in a statute, that one must stand which is in harmony with the spirit and other provisions of the same act. Here it is imperatively commanded that the total cost of an improvement shall be apportioned upon the frontage by the running foot; and in the same section, authorizing the defendant to contest the amount of his assessment, it is subsequently provided that in such suit the court shall give the plaintiff judgment for the amount of the assessment, principal, interest, and costs. It seems to me that what is meant by the language "may contest the amount of the assessment," is that the defendant may require the amount to be brought to the accurate result, as it should be, from a due application of the law. If he has been assessed on fifty feet, and he owns but forty-five, this irregularity must be corrected, and the court give judgment

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for the full amount of the assessment as it would have been if no error had been committed. Under this construction, the statute becomes one consistent, harmonious system, a system that not only makes provision for the making of improvements, but also for paying for the same, yet a system violative of the twenty-first section of our Bill of Rights and of the fifth and fourteenth amendments to the federal Constitution.

Finally, conceding that the charter gives to property owners, who do not sign the waiver, the right to contest the amount of their assessment on the basis of actual benefits, it is very certain that it does not give those who do sign a waiver the same right. This to my mind is one of the chief vices of the law. I am loath to believe that the lawmakers intended that one class of abutters should pay such part of the cost of an improvement as equals the sum of special benefits received by them, and that another class should pay the balance of the cost without reference to the question of benefits. The clear purpose of the provision is to give those who are unable to pay the exaction in a lump sum the chance to save their property by paying in instalments through a long term of years at a moderate rate of interest. The purpose is to benefit those of small means without injuring the contractor or those who pay in full, and, while not relieving them from an equal and just share of the cost of an improvement, it was obviously intended to put them in a situation to pay their part without oppression or serious loss. Surely it was not intended that the impecunious person should pay a greater proportion of the cost than his more fortunate neighbor, yet the ruling leads to this result. If those who do not avail themselves of the right to pay by instalments are permitted to reduce their assessments to the sum of actual benefits received, the result will necessarily follow that contractors will demand an unfair price in anticipation of a loss upon this class of assessments. It can make no difference to those who are pros-

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perous and prepared to pay in full whether the contract price is reasonable or unreasonable, fair or unfair, since in no event can they be required to pay more than the amount of benefits received. It is therefore that class of abutters who are unable to pay their assessments in lump sum, and who are compelled to sign a waiver to secure the right to pay by instalments, who must ultimately bear the entire burden of exorbitant contracts and improvident improvements. To illustrate: An improvement at a fair price costs \$10,000, but the sum of actual special benefits conferred is but \$5,000. Those owning two-fifths of the frontage are able and will pay their assessments in full, and are assessed the total sum of \$4,000. Those owning three-fifths of the frontage are not able to pay in lump sum, and are assessed the total of \$6,000. Those owning the two-fifths refuse to sign a waiver, contest for actual special benefits, and reduce their assessments from \$4,000 to \$2,000. The contractor must therefore lose \$2,000 of his contract price. But suppose the contractor anticipates this result and makes his bid \$13,000 instead of \$10,000. Then there must be assessed against the non-waivers \$5,200, and against those who sign the waiver \$7,800. But the non-waivers will require a reduction of the sum assessed against them, from \$5,200 to \$2,000, the sum of their actual benefits, and the contractor must even then be content with \$9,800, which is \$200 less than a fair price for the work; and those who signed the waiver and whose special benefits, on the same ratio, are but \$3,000, are required to pay \$7,800, being \$4,800 in excess of benefits, and the excess thus exacted of them being about forty-eight per cent. of the total sum paid for the work.

Can it be that the law will sanction such a possibility? And yet it is much more than a possibility. The principle will operate in some degree in every improvement made. If the assessments are demanded alike from all abutters, as originally made by the board of works, as I think it was

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intended they should be, then the extension of time for payment, while it can injure no one, will be a substantial benefit to those of small means, and I can not, therefore, in the absence of clear and explicit terms, yield to that construction of the law which will accord to the prosperous the right to demand that his assessment shall not exceed his benefit, when the exercise of that right will effect a material increase in the burden of the hapless cottager who must choose between the dire alternatives of giving up his property or submitting to an unjust exaction. A statute intended as a beneficence to that class of society whose rights the law cautiously guards should not, by construction, be turned into an instrument of oppression. It is no answer to say that the waiver constitutes a new contract upon a sufficient consideration, made with the eyes open, when the statute shows upon its face that such contracts are, or may be, which amounts to the same thing, secured by a species of coercion.

DISSENTING OPINION.

BAKER, C. J.—It is said that the provisions in reference to a notice and a hearing contained in section 73 of the Indianapolis charter of 1891, together with the opportunity afforded the property owner to defend against the foreclosure suit mentioned in section 75 as amended in 1895, exempt the charter from the operation of the constitutional principles promulgated in the Norwood-Baker case.

Section 73 directs the board of public works, whenever it orders the improvement of a street, to “adopt a resolution to that effect”. “Notice of such resolution shall be published, remonstrances heard, said original resolution modified, confirmed, or rescinded, in the same manner as heretofore more specifically provided by this act with regard to the condemnation of property and the opening of streets. If such original resolution be confirmed or modified, it shall be final and conclusive on all persons, unless within ten days thereafter two-thirds of all the resident freeholders

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upon such street or alley remonstrate against such improvement. In case of such remonstrance, the improvement shall not take place unless specifically ordered by an ordinance within sixty days thereafter, passed by a two-thirds vote of the council, and approved by the mayor."

Section 74 and following provide how, after an improvement has been determined upon, the cost shall be apportioned and collected. It seems clear, therefore, that section 73 can have relation to no question except the advisability of undertaking the improvement. And, since the city has the absolute authority to order the improvement to be undertaken against the unanimous protest of the property owners, the remonstrance evidences no higher legal right than the old petition to the king. *Quill v. City of Indianapolis*, 124 Ind. 292, 7 L. R. A. 691; *Barber, etc., Co. v. Edgerton*, 125 Ind. 455; *Adams v. City of Shelbyville*, 154 Ind. 467. This section 73 does not impair any constitutional right, because the city could have been granted authority to decide upon the necessity of the improvement without giving the property owners an opportunity to express their opinion on that question. But, equally, this section does not protect the owner in his constitutional rights in reference to the method of assessing his property, because that question is governed exclusively by subsequent sections.

This plain meaning can not properly be overcome, I think, by any commixture of section 73 and the provisions of the charter in reference to the condemnation of property. Section 63 (Acts 1891, p. 171) provides: "Whenever the board of public works shall desire to appropriate * * * any property * * * it shall adopt a resolution to that effect, describing the property which may be injuriously or beneficially affected, and shall cause notice of such resolution to be published in some daily newspaper of general circulation in such city once each week for two weeks. Such notice shall name a date, after the last day of publication, at which said board will receive or hear remonstrances from

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persons interested in or affected thereby. Said board shall consider such remonstrances, if any, and thereupon take final action, confirming, modifying or rescinding their original resolution. Such action shall be final and conclusive upon all persons.” Sections 64-68 direct that, after the condemnation has been determined upon, the board shall cause a list to be prepared of the persons and property affected by the condemnation; shall proceed to award the damages sustained and to assess the benefits accruing to each piece of property on the list; shall thereupon cause written notice to be served upon each owner showing the amount of his award or assessment and fixing a time and place for him to remonstrate against the amount of his award or assessment; and shall, after a hearing upon the remonstrances, decide the amount, from which decision the owner may appeal to the circuit court of the county. It thus appears that in condemnation cases the property owner has his constitutional rights fully protected; but this protection is found wholly in sections 64-68. The hearing in section 63 is on the advisability of the board’s proceeding with its declared intention to condemn certain property. And section 73, where it directs that “notice of such resolution shall be published, remonstrances heard, said original resolution modified, confirmed, or rescinded, in the same manner as heretofore more specifically provided by this act with regard to the condemnation of property”, refers to section 63 and not at all to sections 64-68.

I do not perceive how the sum of a naught and a definite quantity differs in value from the definite quantity standing alone; and I therefore believe that the property owners’ constitutional safeguards must be looked for in sections 74-82 which alone refer to the apportionment and collection of special assessments for street improvements.

These sections in clear and mandatory language require the board of public works to assess against the abutting property the total cost of the improvement by the arbitrary

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front-foot rule, to make out an assessment roll accordingly, and to deliver the roll to the department of finance. With that, the duties of the board of public works are at an end. There is no provision in the charter similar to section seven of the Barrett law by which the board of public works is authorized or compelled, on a hearing after notice thereof, to alter or amend the roll so that the assessments shall not exceed the special benefits actually received. It is not pretended that the board of public works may disregard the arbitrary front-foot rule and lay assessments on some other basis. So far, then, as the board is concerned, the statute excludes the consideration of special benefits actually received.

But it is claimed that amended section 75 gives the circuit court, when the contractor comes to foreclose his lien, a power that renders harmless the arbitrary front-foot method required of the board of public works. The section states that the property owner who has not signed a waiver "may contest the amount of his assessment". This is construed to mean that the property owner may require the court to go into the question of special benefits actually received as a matter of fact and to enter judgment for an amount not exceeding such benefits. For reasons set forth at length in the dissenting opinion in *Adams v. City of Shelbyville*, 154 Ind. 467, I think this method of interpretation ignores the context, disregards preceding sections, and violates the entire scope and manifest intent of the act. Furthermore, in my judgment, the method is self-destructive by proving that the property owner would have the same right to require the circuit court to determine from evidence what his special benefits actually were, even if the words in question were omitted from the statute. The interpretation results from the following argument as I understand it: The constitutional principle requiring that a special assessment for street improvements shall not exceed the special benefits in fact received is a limitation

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and restriction upon the amount of such assessment; therefore the words "may contest the amount of his assessment" include the right of the property owner to show that his assessment was not made according to the constitutional principle and the power of the court to hear and determine what the assessment should be according to the Constitution. In my opinion, a property owner need not depend upon the grace of the legislature to enable him to assert in court a right conferred directly by the Constitution. If this be true, it would follow that when the contractor begins his foreclosure suit in a court of equity the defendant would have the right to answer that the assessment was not made according to the constitutional principle, without having to point the court to some statute authorizing that defense. And this result, I take it, is arrived at by the majority in holding that "Any mode of assessment prescribed by the legislature, whether the front-foot rule or any other, is to be regarded as subject to this condition [the constitutional restriction], and, unless inquiry into the question of special benefits is excluded or prohibited by the statute, such inquiry may properly be made by any tribunal before which the question of the collection of an assessment is brought." That is: The statute requires the board of public works to make the assessments by the front-foot rule; but the contractor must go into court to foreclose; and the court, unless prohibited by the statute, may inquire into special benefits in fact received and render judgment for the amount thereof. It is plain that the omission of the words from the statute "may contest the amount of his assessment" would not be a statutory prohibition of the right of the court to conduct an inquiry into special benefits.

So the question becomes: What is the power of a court of equity in a foreclosure suit wherein the plaintiff seeks to recover upon a special assessment for street improvements, laid by the assessing officers according to the front-foot rule under a statute that does not authorize them to pursue any

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other method? The property owner answers that the assessment was made by the board of public works, the assessing officers, according to an unconstitutional method. The plaintiff replies, in avoidance, that the court is a court of equity and has the power in this proceeding to make and collect an assessment according to constitutional principles. In coming to a conclusion that would require circuit courts to sustain and act upon such a reply, the majority hold, as I understand them, that the general grant of power to improve streets carries with it as an incident the right to use the means essential to the legitimate exercise of that power. In concrete form, and applied to the present case, the proposition is this: The city has a general grant of power to improve streets; even if the city officers are required to make the assessment by the front-foot rule, the court, in a suit to foreclose such an assessment, has the right, as an incident to the city's general power, to use the means essential to the constitutional exercise of the power to improve streets.

In further support of their conclusion, the majority apply to the assessments made by the board of public works the holding, in *Adams v. City of Shelbyville*, that the engineer's report by the front-foot rule, as required by section six of the Barrett law, was to be treated only as *prima facie* correct. But there is a vast difference between the Barrett law and the Indianapolis charter. Under the Barrett law it was held that the front-foot rule prescribed in sections three to six was not binding upon the council because in section seven was found a power in the council, on a hearing after notice to the property owners, to change the basis of assessment from frontage to special benefits actually received; and that there was no assessment until one was made by the council after the hearing. Under the Indianapolis charter there is no provision similar to section seven of the Barrett law. The board of public works are definitely commanded to assess

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by frontage. It is not contended that they may take actual special benefits into account. The contractor brings into court an assessment by frontage. If the court is not limited to determining whether or not the assessment is correct by the rule under which the statute commanded the assessing officers to lay it (and on this question alone is the assessment merely *prima facie* correct), but has the power to decide what the property owner ought to pay by the rule of actual special benefits, it was supererogation for the court to base its decision upholding the Barrett law on the power given by section seven to the assessing officer to adopt actual special benefits as the basis of assessment; for under the Barrett law as well as under the Indianapolis charter, the collection of assessments may be resisted in court.

The power of a court of equity in a foreclosure suit upon a special assessment, laid by the city's assessing officers according to frontage, was definitely decided, in my opinion, by the Supreme Court of the United States in the Norwood-Baker case. The Ohio statute gave the village the option of adopting by ordinance the front-foot method or the method of measuring the assessments by benefits actually received. The village chose the front-foot method. The court said: "The assessment was in itself an illegal one because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one." The court announced the self-evident proposition that the *basis* of frontage in and of itself necessarily excludes the consideration of special benefits actually received. If this be true of an assessment by frontage under a statute that gave the village an option of methods, why is it not true of an assessment by frontage under a statute that gives the city no option?

The Supreme Court of the United States decided that "a decree enjoining the whole assessment was therefore the only appropriate one", because, as I view it, the court of equity, when the defendant interposed his constitutional

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guaranties as a defense, as he had the right to do without the consent or over the prohibition of the legislature, was bound to protect his rights by declaring the statute that authorized the frontage method and the ordinance under that statute to be unconstitutional. But this court is now deciding (what the Supreme Court of the United States had the opportunity and refused to hold) that it is the duty of the court of equity to treat an assessment by frontage, which is final so far as the city is authorized to act, as only *prima facie* evidence of the amount the defendant ought to pay on the basis of special benefits actually received, and to determine from all the evidence what that amount really is. Thus, the court of equity lays a constitutional assessment and enters final judgment for its payment in the one proceeding. Thus, the property owner is given no opportunity to pay his assessment laid according to constitutional principles except with the addition of costs and his adversary's attorneys' fees, though he may have stood ready from the beginning to pay his assessment on that basis if the city could and would have given him the chance. Thus, the court of equity, exclusively an agency of the judicial department of the State, provides the method of laying assessments,—exclusively a power of the legislative department; and makes the assessment,—exclusively a function of the administrative department. Thus, the court of equity is required to hold an act which commands the city to assess by frontage to be unobnoxious to the constitutional guaranty of the basis of actual benefits, because it is the duty of the court of equity to disregard the basis of the assessment sued upon (and therefore the statute that prescribed that basis) and to inquire *de novo* and determine for itself what the assessment should be on the constitutional basis.

It may be that the Supreme Court of the United States will decide that a controversy over street assessments between citizens of the same State, under a statute providing ample notice of assessments by frontage and affording due

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opportunity to property owners to be heard on the question whether the assessments have been equally and properly apportioned by frontage, presents no Federal question. It may be that the rulings announced in *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, and in other cases cited in the majority opinion herein, will be held to be controlling in cases like the present one. But, until then, I think the principles promulgated in *Norwood v. Baker*, should be frankly followed.

CRIST v. THE WAYNE INTERNATIONAL BUILDING AND
LOAN ASSOCIATION.

[No. 18,793. Filed June 5, 1900. Rehearing denied July 10, 1900.]

APPEAL.—*Joint Assignment of Errors*.—An assignment of errors joined in by one who did not appear in the court below, and who took no exception to any action or ruling of the court, is insufficient.

From the Huntington Circuit Court. *Affirmed*.

T. G. Smith, for appellant.

J. M. Hatfield and Griffith & Flinn, for appellee.

MONKS, J.—Appellee brought this action to foreclose a mortgage on real estate, executed by appellants, Jennie Crist and Lyman C. Crist, her husband, to secure an indebtedness evidenced by a bond executed by said Jennie Crist. Afterwards the appellant, Minnie Pashong, upon her application showing that she claimed an interest in the real estate described in said mortgage superior to and free from the lien of said mortgage, was by the court made a defendant to this action. Appellant Jennie Crist made default. After issues were joined the cause was tried by the court, special finding of facts made, and conclusions of law stated thereon in favor of appellee, and, over a motion for a new trial by appellants Lyman C. Crist and Minnie Pashong, a decree of foreclosure was rendered ordering the sale of said real estate to pay the indebtedness secured by said

155	280
155	311
155	260
166	143

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mortgage. Appellants, Lyman C. Crist, Jennie C. Crist, and Minnie Pashong join in the assignment of errors.

The rulings of the court assigned as errors affect only the appellants Lyman C. Crist and Minnie Pashong, either jointly or severally, and no ruling or action of the court affecting all the appellants jointly is assigned as error. It is evident that said assignment of errors was not good as to appellant Jennie Crist, who did not appear in the court below, and who took no exception to any action or ruling of the court.

It is settled law in this State that if several appellants join in an assignment of errors it must be good as to all the persons joining therein, or it will be insufficient as to each of them. Ewbank's Manual, §138; *Sweeney Co. v. Fry*, 151 Ind. 178, 181, 182, and cases cited; Elliott's App. Proc. §839.

Judgment affirmed.

MOORE, ADMINISTRATOR, v. MOORE ET AL.

[No. 19,171. Filed May 15, 1900. Rehearing denied July 10, 1900.]

EXECUTORS AND ADMINISTRATORS.—*Sale of Real Estate to Pay Debts.*—*Contract with Administrator and Heirs for Sale.*—Administrator instituted proceedings to sell real estate to pay debts. A cross-complaint therein was filed setting forth that under an agreement of sale with the administrator and the heirs the cross-complainant took possession of the real estate and made valuable improvements thereon, and asking that cross-complainant be given a first lien on the proceeds of the sale for the value of the improvements. *Held*, that the cross-complaint did not state a cause of action.

From the Boone Circuit Court. *Reversed in part.*

I. M. Sharp, for appellant.

C. M. Greenlee, *B. R. Call* and *A. J. Shelby*, for appellees.

MONKS, J.—Appellant commenced this proceeding to sell the real estate of his intestate, described in the petition,

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to pay debts. Charles J. and Ada Fox were made defendants to said petition to answer as to their interest, if any, in said real estate. Ada Fox filed a cross-complaint, asking that she be reimbursed for valuable and lasting improvements made by her on said real estate, and for other relief. After issues were joined, the cause was tried by the court, and, over appellant's motion for a new trial, said real estate was ordered sold, and that, after applying a part of the proceeds of the sale to the payment of the debts of said decedent, said Ada Fox be paid the sum of \$800 to reimburse her for the improvements made by her on said real estate, and the remainder to be accounted for by said administrator.

The assignment of errors calls in question the sufficiency of the cross-complaint of Ada Fox.

The allegations of the cross-complaint of Ada Fox are substantially as follows: That Willis E. Moore died intestate in September, 1896, the owner of the real estate described in the petition, leaving as his only heirs his sons Jonathan J., David A., and Willis C. Moore; that said Jonathan J. was duly appointed administrator of his estate; that in 1897 the cross-complainant entered into an oral agreement with said Jonathan J. Moore, administrator, and the other heirs, that said administrator was to obtain an order of court to sell said real estate at private sale, and convey the same to this cross-complainant, for which she was to pay \$1,200; that under said agreement she took possession of said real estate, and while in possession thereof she made lasting and valuable improvements thereon in rebuilding the dwelling-house and outhouses and fences, to the value of \$1,050; that said real estate, by reason of said improvements, has been greatly enhanced in value, and is now worth \$2,500, and without them would not be worth over \$1,200; that this cross-complainant took possession of said real estate and made said lasting improvements thereon, relying upon the statement made and the agreement en-

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tered into with said parties as herein set forth; that said parties and said administrator at the time of making said agreement represented to this cross-complainant that said estate was solvent, and that said real estate would not be needed by said administrator to pay the liabilities of said estate; that said administrator and said parties have failed and refused to carry out their part of said agreement, or any part thereof. Prayer that the court "order said administrator to sell said real estate and the improvements thereon, and that the cross-complainant be given a first lien on the proceeds of said sale for \$1,400, the present value of said improvements," etc.

The devisee or heir of real estate takes the same subject to the indebtedness of the deceased. *Baker v. Griffitt*, 83 Ind. 411, 416; *Moncrief v. Moncrief*, 73 Ind. 587; *Weakley v. Conradt*, 56 Ind. 430.

In this State the real and personal estate of a decedent are equally chargeable with the payment of his debts, it being provided, however, that the real estate can only be sold when the personal estate has been exhausted, or is insufficient for the payment of debts. *Fiscus v. Moore*, 121 Ind. 547, 552, 553, 7 L. R. A. 235. Under our statutes the real estate is as completely subject to the debts of the intestate as the personal estate, and when the personal estate is sufficient to pay the debts of the intestate, yet if it is wasted by the administrator the real estate may be sold for the payment of debts of the intestate, even though the heirs have sold and conveyed the same to third parties. *Fiscus v. Moore, supra*; *Nettleton v. Dixon*, 2 Ind. 446; Henry's Prob. Law, §188. It is evident, therefore, that a purchaser from the heirs acquires precisely the same right and interest the heirs have, and no more, and he is bound to know that until the estate is finally settled the sale of the real estate may become necessary for the payment of debts. Henry's Prob. Law, §§189, 195; *Chapman v. Sullivan*, 128 Ind. 50.

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It is clear, therefore, that the rights or interests in said real estate, if any, acquired by appellee Ada Fox from the heirs of said decedent under the alleged oral agreement, are subject to the debts of said deceased, and she is entitled to no relief or protection in this proceeding on account of any such rights or interests acquired from the heirs. *Fiscus v. Moore*, 121 Ind. 547, 553.

The consent of the administrator to a sale of the land by the heirs does not divest the creditor of his right to have his debt made out of the land, nor estop the administrator from procuring an order of sale to pay such creditor. *Moncrief v. Moncrief*, 73 Ind. 587, 591; *Baker v. Griffitt*, 83 Ind. 411, 415.

An administrator has no right to the possession of the real estate of his decedent, but the title to the same, with the right of possession, vests at the instant of the death of the intestate in his heirs subject to the debts of the intestate, and they take and retain such title with all the rights and incidents belonging thereto subject to the right of the administrator to procure an order to sell the same to pay said debts.

An executor or administrator has no authority to sell the real estate of his decedent, except by order of court, in the absence of a testamentary provision authorizing such sale. *Duncan v. Gainey*, 108 Ind. 579, 584; *Edwards v. Havestick*, 47 Ind. 138; *Hankins v. Kimball*, 57 Ind. 42; *Kidwell v. Kidwell*, 84 Ind. 224. An estate is not liable for false representations or other torts of an administrator. *Riley v. Kepler*, 94 Ind. 308, 311, and cases cited.

It is clear that the administrator had no authority to make the contract alleged in the cross-complaint, and that the appellee Ada Fox acquired no right, title, or interest whatever in or to said real estate from said administrator under said contract. She was bound to know that said administrator had no authority to make such contract, and that she acquired no right thereunder from him or against

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said estate. She made the improvements alleged with full knowledge of such want of authority, and her rights are no greater than they would have been if the administrator had not joined in said oral contract, and had never made any agreement or representation as such. It is clear that said cross-complaint did not state facts sufficient to constitute a cause of action.

So far as the judgment orders \$800 of the proceeds of the sale of real estate paid to Ada Fox, and adjudges costs in her favor, the same is reversed, with instructions for further proceedings in accordance with this opinion.

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[No. 19,276. Filed October 2, 1900.]

155	265
157	444

TRIAL.—Jury.—Telegram to Juror.—Criminal Law.—A cause will not be reversed because of the action of the court in informing one of the jurors in the presence and hearing of the other jurors that he had a telegram for him from his wife, and that he had answered it, telling her that her husband would be home as soon as the trial was concluded, where the nature of the telegram is not disclosed by the record. *pp. 267, 268.*

155	265
169	502

INSTRUCTIONS.—Reasonable Doubt.—Criminal Law.—Harmless Error.—A criminal cause will not be reversed because of a defective instruction on the question of reasonable doubt, where the charge was not impressed with affirmative error, but was incomplete or obscure, and the court was not requested to give an instruction embracing a more complete exposition of the law relative to the question, and it is not shown that the complainant was prejudiced to any extent in any of his substantial rights. *pp. 268-271.*

SAME.—Malice.—Criminal Law.—An instruction that malice as used in the statutes defining murder has a technical meaning, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive, that it is not confined to ill will toward one or more individual persons, but is used and intended to denote an action growing from any wicked or corrupt motive—a thing done with bad or malicious intent—where the fact has been attended by such circumstances as carry in them the plain indication of a heart regardless of social duty, and fatally bent on mischief, is a proper definition of malice, and the further statement therein that “malice is implied from any deliberate and cruel act against another, however sudden,” was not erroneous as invading the province of the jury. *pp. 271, 272.*

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INSTRUCTIONS.—Malice.—Criminal Law.—Where in a prosecution for murder it was shown that after defendant had fired the fatal shot and the deceased had staggered and retreated from twenty to forty feet and ceased to make any demonstration or effort to inflict injury, that defendant stood up in his buggy and deliberately fired another shot at deceased, it was not error to instruct the jury that they might consider the circumstances of the firing of the second shot along with other circumstances as tending to show malice in the mind of defendant. *pp. 272-274.*

SAME.—Evidence.—A cause will not be reversed on the ground that certain instructions given were not applicable to the evidence, where there was some evidence to which the instructions complained of were applicable. *p. 274.*

SAME.—Refusal to Give.—Appeal and Error.—A cause will not be reversed because of the action of the court in refusing to give an instruction where it does not affirmatively appear from the record that the instruction was tendered before the commencement of the argument with a request that it be given. *p. 275.*

CRIMINAL LAW.—Homicide.—A verdict finding defendant guilty of murder in the second degree will not be disturbed on appeal on the evidence, where it was shown that defendant was sitting in his buggy near the sidewalk engaged in a conversation with another person, and, upon seeing deceased pass along the sidewalk, accosted him with vile language which so angered deceased that he came over to where defendant was sitting, when defendant struck him with a horsewhip and deceased grabbed the whip and struck defendant, whereupon defendant drew a revolver and fired the fatal shot, and when deceased was reeling from the effects of the shot, defendant stood up in his buggy, fired the second shot, and drove away saying that he had fixed or settled him. *pp. 275, 276.*

SAME.—Impaneling Grand Jury.—Appeal and Error.—A cause will not be reversed because of the action of the court in denying defendant's motion in arrest of judgment based upon the ground that the record did not show that the grand jury which returned the verdict was duly impaneled, sworn, and charged, where the record showed that the grand jury of the county returned into court the indictment upon which defendant was tried, and that defendant was arraigned thereon and entered a plea of not guilty, without imposing any objection to the impaneling of the jury. *p. 276.*

From the Lawrence Circuit Court. *Affirmed.*

O. H. Montgomery, H. Morris, M. B. Hottel, J. M. Lewis, Jr., C. C. Matson and J. Giles, for appellant.

W. L. Taylor, Attorney-General, J. A. Zaring, Merrill Moores and C. C. Hadley, for State.

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JORDAN, J.—Appellant was charged in the Jackson Circuit Court with the premeditated murder of George Brown. The cause was venued to the Lawrence Circuit Court, wherein, on a trial before a jury, he was convicted of murder in the second degree, and, over his motion for a new trial, was sentenced to be imprisoned during his natural life. Appellant admitted in the lower court that he shot and killed the deceased, but claimed that he was justified in so doing upon the ground of self-defense. His counsel present several alleged errors upon which they seek a reversal of the judgment below.

It is disclosed by a bill of exceptions that on the day the trial was concluded, and after the court had instructed the jury, but before they had retired to deliberate upon a verdict, and while the jurors were still occupying their seats in open court, the trial judge, on his own motion and without the knowledge of the defendant of his purpose to do so, called Jonathan Wright, one of the jurors, to the court's desk, and there informed said Wright, in a tone of voice so as to be distinctly heard by the other jurors, that he, the judge, had a telegram for him, and then handed the telegram to Wright, who opened it, and read it, and then returned it to the judge; that the latter then stated, so as to be heard by all of the jurors, that he, the judge, had knowledge of the contents of the telegram, and that he had wired Mrs. Wright, wife of the juror, that the cause on trial was nearing its close, and that her husband would be at home as soon as the trial was concluded; and that thereupon the jury retired to their room.

It is insisted by appellant's learned counsel that Wright's associates upon the jury panel must have known and understood, from the statement made by the court to said juror, that some serious emergency had arisen which required his presence at home as soon as possible, and that Wright must have informed his fellow jurors in regard to the contents of the telegram upon the retirement of the jury to their

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room; and that the jury, in their zeal to accommodate their associate and permit him to return to his home as soon as possible, were induced to act hastily in making a verdict, and thereby were prevented from exercising due deliberation and from giving the questions involved their due consideration. What the telegram contained, or for what reason the juror's wife desired his presence at home is not disclosed by the bill of exceptions, and therefore we are not advised in regard to its contents, or the emergency, if any, which required the presence of the juror at his home, unless we accept what is shown by the affidavit of appellant filed in support of his motion for a new trial. This document, however, has not been made a part of the record by a bill of exceptions, and, hence, we are not permitted to review the statements of the affiant therein, or give them any consideration whatever. Neither are we advised by the record as to whether or no the contents of the telegram were in any manner disclosed by Wright to his associates after they retired to the jury room. Therefore, under the circumstances, we are left wholly to conjecture in respect both to the matter which required the presence of Wright at home and in regard to its communication to the other members of the jury. Certainly, under such circumstances, this court is not in a position to determine as to whether the information contained in the telegram in any manner operated to influence either Wright or any of his associates in his or their deliberations, or in any way tended to interfere with them in the due consideration of the questions involved upon the trial. This court can not, in the consideration of questions upon appeals, indulge in unwarranted presumptions. *Messenger v. State*, 152 Ind. 227. There being nothing in the record to support appellant's contention upon this specification of error, it is therefore dismissed without further consideration.

It is next urged that the trial court erred in giving certain instructions to the jury. Charge number five, which

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relates to the law upon the question of reasonable doubt in a criminal case, is severely criticised and condemned as erroneous by counsel for appellant. This charge is as follows: "No. 5. What is a reasonable doubt? This does not mean that the proof must be free from all doubt. Proof is to be deemed to be beyond reasonable doubt when the evidence is sufficient to impress the judgment of an ordinarily prudent man with a conviction on which he would act without hesitation in his most important concerns in life. You are not to go beyond the evidence to hunt for doubts. A doubt, to justify an acquittal, must be reasonable, and must arise from a fair and impartial consideration of all of the evidence in the case." In addition to the above instruction, the court also gave to the jury, as bearing upon the question of the force and effect of a reasonable doubt, the following: "The defendant comes into court and for plea says that he is 'not guilty', and the court instructs you that it is incumbent on the prosecution to prove every material allegation of the indictment as therein charged. Nothing is to be presumed or taken by implication against the defendant, but every presumption of the law is in favor of his innocence; and in order to convict him of the crime alleged in the indictment, or of any lesser crime included in it, every material fact necessary to constitute such crime must be proved beyond a reasonable doubt, and if the jury entertain any reasonable doubt upon any material fact necessary to constitute the crime, it is your duty, gentlemen, to resolve that doubt in favor of the defendant, and acquit him. When there is a reasonable doubt in which of two or more degrees of an offense a defendant is guilty, he must be convicted of the lowest degree only." Also the following, numbers three and five, which were given at the request of appellant: "No. 3. When the taking of life is sought to be justified on the ground of self-defense, it is not incumbent on the accused to satisfy the jury that the killing was justifiable, but, if the evidence on that question is sufficient

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to raise a reasonable doubt in the minds of the jury as to whether the defendant was justifiable, then the defendant is entitled to an acquittal." "No. 5. It is incumbent upon the State to establish the guilt of the defendant of some offense embraced within the indictment to the exclusion of every reasonable doubt in the mind of each of you before you can return a verdict of guilty. The minds of each and all of you must concur in your verdict and if any one of you has a reasonable doubt of defendant's guilt or a reasonable doubt as to whether he was justifiable or excusable in what he did, you can not convict."

The objection which counsel for appellant present against instruction number five is that it is not sufficiently accurate and complete in its definition of what constitutes a reasonable doubt in a criminal prosecution. It is contended that the charge is faulty for two reasons: (1) Because it omits to embody the statement to the jury, to wit,—“As prudent men you would feel safe to act upon such conviction in matters of the highest concern and importance to your own dearest and most important interests, and under such circumstances where there was no compulsion upon you to act at all”; (2) because it states that the doubt must arise from a fair and impartial consideration of all of the evidence in the case.

It is contended by counsel that a reasonable doubt may not only arise out of the evidence, but may also be created in the minds of the jury by reason of the lack of evidence. This latter contention is well supported by the decisions of this court; and to this extent, at least, it may be said that the charge in question is too narrow. The instruction, considered as an entirety, does not fully measure up to the test given in a long line of cases like *Bradley v. State*, 31 Ind. 492; *Jarrell v. State*, 58 Ind. 293; *Knight v. State*, 70 Ind. 375; *Garfield v. State*, 74 Ind. 60; *Behymer v. State*, 95 Ind. 140; *Brown v. State*, 105 Ind. 385; *Farley v. State*, 127 Ind. 419, and others which might be cited. Appellant

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seems, however, at the trial to have been satisfied with this instruction, as it does not appear that he tendered and requested the trial court to give any more specific or broader charge in respect to what was required to constitute reasonable doubt in the minds of the jury. It can not be affirmed that the charge in question is impressed with affirmative error. Its infirmity consists in its being incomplete or obscure, but doubtless this would have been remedied if appellant had requested the trial court to give an instruction embracing a more complete or broader exposition of the law relative to the question of reasonable doubt. This, as we have previously said, appellant omitted to do, and, hence, under the circumstances, he does not occupy a favorable attitude to complain of the infirmities which he imputes to the instruction in dispute. When this particular charge is considered along with the others which we have heretofore set out, we do not believe that appellant was to any extent prejudiced in any of his substantial rights. The rule, as affirmed by this court, is that, in order to justify a reversal in a criminal case for a mere inaccurate definition of what is required under the law to constitute reasonable doubt, it must plainly appear that the defendant was prejudiced thereby in his substantial rights. *Heyl v. State*, 109 Ind. 589. As we view the evidence in this case, we are satisfied that the instruction complained of was not influential in misleading the jury to the detriment of appellant.

The court, at the request of the State, gave to the jury the following instruction: "Malice, in law, and as used in the statutes defining murder, has a technical meaning, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill will towards one or more individual persons, but is used and intended to denote an action growing from any wicked and corrupt motive,—a thing done with bad or malicious intent,—where the fact has been attended by such circumstances as carry in them the plain indication of a heart re-

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gardless of social duty, and fatally bent on mischief; and therefore malice is implied from any deliberate and cruel act against another, however sudden."

This latter charge is criticised upon the ground that it is not a correct statement of the law in respect to the question of malice in a criminal case. It is substantially the same as an instruction given upon that question in the celebrated trial of John W. Webster upon the charge of the murder of Dr. Parkman. See *Commonwealth v. Webster*, 5 Cush. 293. The definition of malice as therein given was referred to with approval and adopted by this court in *Coghill v. State*, 37 Ind. 111; and was again approved in *McDermott v. State*, 89 Ind. 187. The instruction in question, considered in its entirety, in our opinion, states the law correctly. The part more especially criticised by counsel for appellant is the latter part, wherein it is stated that "malice is implied from any deliberate and cruel act against another however sudden". It is contended that this part of the charge invades the province of the jury. This error, in our judgment, can not be successfully imputed to the instruction. The court thereby merely advises the jury that malice, as a legal inference, may be deduced from the perpetration of any *deliberate and cruel act* by one person against another. (Our italics.) It is certainly evident that such an inference may be drawn from an act or deed so committed, and this statement to the jury by the court, in regard to such a legal proposition, can not be said to be an invasion upon any of their rights. Of course, the inference arising from such an established fact or facts is not conclusive, but may be rebutted by countervailing evidence, and in this light, in the absence of anything to the contrary, we must presume the charge was so understood by the jury.

The trial court also gave, at the request of the State the following instruction: "If you find from the evidence beyond a reasonable doubt that the defendant, Harris, had inflicted upon George Brown, the deceased, a mortal wound,

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by shooting said Brown with a pistol, and the said George Brown, immediately after the infliction of said injury, staggered, retreated, or traveled away from the defendant, and ceased to make any demonstration toward defendant, or to make any effort to inflict injury upon the defendant, and immediately thereafter, but after defendant had become separated from said George Brown a distance of from twenty to forty feet, the said defendant arose in his buggy, and deliberately discharged a second shot at or in the direction of said Brown, whether said second shot did or did not strike the person of said Brown, you may consider the circumstances of the firing of said second shot, along with all the other circumstances of the case so proved, as tending to show malice in the mind of the defendant."

It is claimed by appellant that, by reason of the fact that the first shot fired by him was the fatal one, consequently the second shot could have no bearing upon the question of malice relative to the firing of the fatal shot. It is contended that the inquiry was to be addressed solely to the motive which prompted the accused to fire the fatal shot. It is insisted that if the latter was justified upon the grounds of self-defense, then the act of the defendant in firing the second, which it is claimed did not hit the deceased, though reprehensible from a moral view, can have no legitimate bearing upon the issue of malice. There is no merit in this insistence, and we are of the opinion that no error was committed by giving the instruction in controversy. The evidence, it is true, discloses that the first shot was the fatal one. It is also shown that after appellant had fired it, and after the deceased, in the very agony of death, had staggered away from appellant to a distance of some twenty or forty feet, and was apparently in the act of falling, appellant stood up in his buggy, and deliberately fired the second shot at him. The charge presented against appellant, and which was in issue upon the trial, was that of

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a malicious murder. The burden of proving malice was upon the State, and it had the right to have the jury consider all of the circumstances bearing upon this feature of the case, regardless of the fact as to whether such circumstances happened before or after the homicide.

There is a conflict in the evidence as to whether the second shot hit the deceased, but it is apparently shown by the evidence that this latter shot was fired by the appellant without any necessity or excuse for doing so. It was therefore proper for the jury to consider the firing of this shot, along with the other circumstances in the case, as tending to show, or, rather, as bearing upon the question of malice, which, as the State claimed, caused or prompted appellant to commit the homicide.

There is no merit in the contention of appellant's counsel that the effect of the instruction was to advise the jury that, if there was an absence of malice upon the part of the accused when he fired the first shot, then the jury might consider the firing of the second as evidence of malice. If, however, it was apparent to appellant, as the evidence we think discloses, that he had mortally wounded the deceased, and when the latter was staggering under the effects of the first shot, and retreating from the defendant, he, without any necessity therefor, deliberately fired the second shot at the deceased it would seem that this fact, under the circumstances, was proper evidence to be considered by the jury in determining whether appellant, in killing the deceased, was actuated by malice, and not in an honest belief that it was necessary for him to do so in the exercise of his right of self-defense.

Objections are urged to instructions three, four, and six, given by the court at the request of the State. The insistence is that these are not applicable to the evidence. As there is some evidence to which these instructions are applicable, this contention can not be sustained. *Reed v. State*, 141 Ind. 116; *Hanes v. State*, ante, 112.

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Several other instructions given by the court upon the law relative to self-defense are criticised by counsel for appellant. We have carefully examined these, and also the entire charge of the trial court upon the question of self-defense, and, when the instructions given upon this feature of the case are considered as a whole, they state the law as favorably for defendant as he, under the evidence, had any right to demand.

Error is also assigned and argued upon the refusal of the court to give instruction number eight. We can not review the action of the trial court in refusing this instruction, for the reason that it does not affirmatively appear from the record that it was tendered to the court by appellant with the request that it be given, before the commencement of the argument. This the statute requires. §1892 Burns 1894, Cl. 6. A party in a criminal cause who desires to avail himself of this statutory right must comply with the conditions therein imposed. If he desires that special instructions be given upon any feature or question in the case, he should, before the commencement of the argument, prepare, sign, and present such instructions to the court with the request that they be given. Otherwise, the court is justified in refusing them; and upon appeal to this court, if error is predicated upon such refusal, in the absence of any affirmative showing to the contrary, we must indulge in the presumption that the instruction or instructions in question were refused for the reason that they were not seasonably tendered to the lower court as required by the statute. This rule is firmly settled by repeated decisions of this court.

Counsel for appellant next complain that the evidence is not sufficient to support the verdict. We would not be justified in disturbing the judgment upon the evidence. It is true that there is a conflict in the testimony of the witnesses, especially as to which one of the parties, appellant or deceased, commenced the assault. The uncontradicted evidence shows that the deceased was passing peacefully along

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the sidewalk in the city of Seymour. Appellant, who, as it appears from the evidence, was, to an extent at least, under the influence of intoxicating liquor, was seated in his buggy near the sidewalk, engaged in a conversation with another person. Upon seeing the deceased pass along the street, he accosted him by using and applying to him vile and insulting language. This seems to have angered the deceased, and he came over to where the appellant was seated in his buggy. Witnesses testified upon the trial that appellant first assaulted the deceased with a horsewhip; that the latter grabbed the whip from appellant, and struck him with it; that thereupon appellant drew a revolver, which he had in his coat pocket, and fired the fatal shot, and that when the deceased was reeling, as previously stated, from the effects of the shot, appellant stood up in his buggy and fired at him the second shot, and then drove away, saying, in substance, that he had "fixed or settled him". After the homicide he immediately fled from his home in Seymour, and went to the home of a relative, where he concealed himself for some time, until he was discovered and arrested by the officers who were searching for him.

It is next and finally insisted that the court erred in denying appellant's motion in arrest of judgment. One of the grounds assigned in this motion for arrest was that the record did not show that the grand jury which returned the indictment was duly impaneled, sworn, and charged. It is insisted that for this reason the court had no jurisdiction. The record does, however, show that a grand jury of the Jackson Circuit Court returned into that court the indictment upon which the defendant was tried; that he was arraigned thereon, and entered his plea of "Not Guilty". This is sufficient to show that the indictment was legally returned against appellant by the proper grand jury, and, if there was anything illegal or irregular in respect to the impaneling of the grand jury, appellant should have interposed such objections by plea in abatement. *Henning v. State*, 106 Ind. 386, 55 Am. Rep. 756.

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We have carefully examined all of the questions presented by counsel for appellant, and are satisfied that there is no such error shown by the record as would authorize a reversal of the judgment. The judgment is therefore affirmed.

GAFF v. THE STATE.

[No. 19,813. Filed October 2, 1900.]

JURY.—Competency of Juror.—Officers.—Criminal Law.—Sheriffs have such pecuniary interest in securing convictions in criminal cases as to render their deputies incompetent to serve as jurors in a criminal case. *p. 278.*

SAME.—Competency of Juror.—Challenge for Cause.—Criminal Law.—Although §1862 Burns 1894 professes to give all the grounds of challenge for cause, the constitutional guaranty of an impartial jury will not be allowed to be destroyed by the legislature's omission of grounds that clearly render the juror incompetent. *p. 278.*

SAME.—Talesmen.—Deputy Sheriffs as Jurors.—New Trial.—Criminal Law.—Where, after trial and conviction, it appeared that two of the jurors called as talesmen were deputy sheriffs of the county, such fact being unknown to defendant or his attorneys until after the verdict, the defendant was entitled to a new trial. *pp. 278, 279.*

From the Noble Circuit Court. *Reversed.*

T. M. Eells and R. P. Barr, for appellant.

W. L. Taylor, Attorney-General, *T. V. Whiteleather*, *Merrill Moores* and *C. C. Hadley*, for State.

BAKER, C. J.—Appellant was convicted of assault and battery with intent to commit a rape. He complains of the refusal of the court to grant him a new trial. Among the reasons assigned, it was stated that two of the jurors were deputy sheriffs of the county. In support of the motion, appellant filed his affidavit that the two jurors were deputy sheriffs, that they were not of the regular panel but were called as talesmen, that neither appellant nor his attorneys knew that the two jurors were deputy sheriffs until after the return of the verdict, that the two jurors were examined generally as to their competency but failed to disclose that

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they were deputy sheriffs, and that if the facts had been known to appellant he would have challenged them from the jury. One of appellant's attorneys filed his affidavit that after the return of the verdict the sheriff informed him that the two jurors were deputy sheriffs when they tried the case. Both of appellant's attorneys filed affidavits that they had no notice nor knowledge that the two jurors were deputy sheriffs until after the return of the verdict, and that if they had known the fact they would have interposed challenges for cause. In opposition to the motion, the two jurors filed their affidavits that they were not biased against appellant, that they had no pecuniary interest in the result of the case, that they did not arrest appellant, that they did not serve any subpoenas or other writs in the case, and that they were not to receive any part of the sheriff's costs.

These deputies were not competent to serve on the impartial jury that is guaranteed by the Constitution. The sheriff is now paid a salary, and the fees belong to the county. But, inasmuch as the county does not pay the sheriff his salary except out of fees earned and collected, the sheriff has a clear pecuniary interest in securing convictions in criminal cases, since no judgment for costs can be rendered against the State. These deputies, therefore, stood in the position of employes of one who was pecuniarily interested in their verdict. And, though §1862 Burns 1894, §1793 R. S. 1881 and Horner 1897, professes to give all the grounds of challenge for cause, of which the present is not one, the constitutional guaranty of an impartial jury will not be allowed to be destroyed by the legislature's omission of grounds that clearly render the juror incompetent. *Block v. State*, 100 Ind. 357; *Zimmerman v. State*, 115 Ind. 129; *Rhodes v. State*, 128 Ind. 189, 25 Am. St. 429.

These deputy sheriffs would doubtless have been rejected by the court on challenge for cause if the facts had been made known. Appellant was not bound to anticipate that talesmen would be called from among the sheriff's deputies,

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and these men should have disclosed the relationship on the general examination as to their competency. *Block v. State*, 100 Ind. 357; *Rhodes v. State*, 128 Ind. 189, 25 Am. St. 429.

Judgment reversed, with directions to sustain the motion for a new trial.

GOODRICH ET AL. v. STANGLAND ET AL.

[No. 18,632. Filed October 3, 1900.]

APPEAL.—Assignment of Errors.—Parties.—Designation.—Rules.—A designation of the parties in an assignment of errors by the initials of their Christian names, though in violation of rule six of the Supreme Court, will not render the assignment fatally defective, where such designation conforms to the names in the pleadings filed by the parties themselves. pp. 281, 282.

SAME.—Term-time Appeal by One of Several Judgment Defendants.—Bond Does Not Inure to Benefit of Others.—Where one of several judgment defendants took an appeal in term time, and filed bond conditioned to prosecute the appeal, and pay all costs accruing against him, such bond did not inure to the benefit of the others. pp. 281, 282.

SAME.—Appearance.—Parties.—Though appellees' appearance will operate as a waiver of notice of appeal, it will not cure the omission of the names of the persons who should have been joined as appellants. p. 282.

DRAINS.—Petition.—Notice.—Where, by the report of the drainage commissioners on a petition which had been referred to them by the court, it appeared that lands were affected by the drain which were not named in the petition, and the court fixed the time for hearing the report, a notice to the owners of such lands need not, under §5624 Burns 1894, contain a description of the land. pp. 282, 283.

SAME.—Petition.—Drainage of Lakes.—Where a petition for a drain did not ask for the drainage of lakes, the fact that the proposed route ran through several small natural water basins did not invalidate the proceedings as being for the drainage of lakes. p. 283.

SAME.—Petition.—Lateral Drains.—Where the petition for a drain asked for such lateral or branch drains as might be deemed necessary by the drainage commissioners, the proceedings were not invalidated because the commissioners' report provided for lateral drains not expressly designated in the petition. pp. 283, 284.

TRIAL.—Change of Judge.—Appeal.—The general rule that the denial of an application for a change of judge cannot be considered on

155	279
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161	328
162	369
162	370
162	371

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163	237

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166	200

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169	45
169	278

155	279
171	12
171	88
171	463

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appeal, unless it is first presented in a motion for a new trial, is not applicable where the change was sought in an action in which judgment was rendered by default. pp. 284, 285.

TRIAL.—*Change of Judge.*—*Waiver.*—Where a motion to strike out a remonstrance to a proposed drain had been heard and submitted, the remonstrant thereby waived his right to apply for a change of judge. p. 285.

From the Noble Circuit Court. *Affirmed.*

B. E. Gates and *L. W. Welker*, for appellants.

E. K. Strong and *H. G. Zimmerman*, for appellees.

DOWLING, J.—This was a proceeding, under the statute, for the drainage of certain lands in Noble and Whitley counties. The petition was filed in the circuit court of Noble county. §5623 Burns 1894. It was properly docketed, and notice was given to the owners and occupants of the several tracts of land, described in the petition, in the manner prescribed by law. No remonstrance having been filed, and the court deeming the petition sufficient, an order was made referring the same to the drainage commissioners. Such commissioners made their report to the court, from which it appeared that lands were named in said report as affected by the proposed work which were not named in the petition. The court fixed a time for hearing the report, and the petitioners gave notice to the owners of such lands of the filing of the report, and the date fixed for the hearing. The appellants entered a special appearance, and moved to set aside the service of the notice on them, and to strike out the notices. They also filed motions to dismiss the petition, and to strike out the report of the drainage commissioners. Both motions were overruled. Appellants next filed their separate remonstrances, and appellees moved to strike the remonstrances from the files. Pending the latter motion, and after it had been submitted for determination, the appellants asked for a change of judge, and filed affidavits in support of the motion. The application for a change of judge was denied. The court struck out the re-

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monstrances of the appellants, and rendered judgment agreeably to the provisions of the statute, declaring the proposed work established, approving the assessments as made by the commissioners, and assigning the construction of the work to a disinterested freeholder of the county. After the court had established the said work, the appellants filed a motion in arrest of the judgment, which was overruled. The rulings of the court upon the several motions, with the exceptions thereto, are properly presented by the record.

The assignment of errors calls in question the jurisdiction of the court over the persons of the appellants and the subject of the action, and it denies the validity of the rulings upon the several motions for a change of judge, the striking out of the remonstrances, and in arrest of judgment. Objection is made by appellees that the assignment of errors is defective on account of its failure to set out the full names of the parties, and because it omits the names of some of the persons against whom the judgment was rendered, and the dismissal of the appeal is demanded for these reasons. Only the initials of the Christian names of many of the appellees are given, and this is a violation of rule six of this court, and in most cases is a sufficient cause for the dismissal of the appeal. The following are some of the names by which a portion of the appellees are designated: "S. S. Bonar," "J. R. Young," "A. F. Evans," "C. D. Evans," "A. W. Potts," "J. S. Sterling," "E. W. DePew," "J. H. Kitt," "J. M. Richmond." This method of designating parties has frequently been disapproved by this court, both in civil and criminal cases. In this case, however, as the appellants were named in the assignment of errors, just as they are named in the pleadings filed by them, we think rule six will not render the assignments defective.

In answer to the objection that all of the persons against whom the judgment was rendered are not joined as appel-

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lants, it is said by counsel that this was a term-time appeal, and that the omission of the names was expressly authorized by the act of 1895 (Acts 1895, p. 179), §647a Burns Supp.; Ewbank's Manual, §126, note 1. This statement is not borne out by the record. Silas Goodrich, one of the remonstrants, took an appeal in term, and filed an appeal bond as required by the court. But the condition of the bond was that Goodrich would prosecute the appeal, and pay the judgment and costs which might be rendered, or affirmed, against *him*. This bond did not, either in terms, or in legal effect, inure to the benefit of the other judgment defendants. The filing of an appeal bond is an essential step in perfecting a term appeal. §650 Burns 1894; *McKinney v. Hartman*, 143 Ind. 224; Ewbank's Manual, §9. As the appellants, other than Goodrich, filed no bond, the appeal as to them was a vacation appeal, and they were required to join all the parties to, and affected by, the judgment. *Abshire v. Williamson*, 149 Ind. 248; *Michigan Mutual Ins. Co. v. Frankel*, 151 Ind. 534.

The appearance of the appellees operated as a waiver of notice, but it did not cure the omission of the names of the persons who should have been joined as appellants, and named in the assignment of errors. Because of the omission of the names of the persons who should have been joined as appellants, the appeal must be dismissed as to all of the appellants, excepting Silas Goodrich.

The points made on behalf of the appellant Goodrich, are simply questions of practice. Jurisdiction over his person is denied on the ground that the notice served on him by the petitioners did not contain a description of the lands assessed for benefits. In our opinion, the notice was sufficient in form. The statute required that notice should be given to the owners or occupants of lands named in the report of the drainage commissioners, which were not named in the petition, in the same manner as notice was required to be given of the filing and docketing of the petition, and

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that it should state the time for hearing the report. §5624 Burns 1894.

The requisites for the notice of the filing and docketing of the petition were that it should state (1) the route of such drain as described in the petition; (2) the fact of the filing and pendency of the petition, and (3) when the same should be docketed. §5624 Burns 1894.

The statute did not require either the original notice, or the subsequent notice to the owners or occupants of lands named in the report of the commissioners which were not named in the petition, to set forth a description of the lands assessed for benefits. The form given in the statutes (§5654 Burns 1894) does contain a description of the lands. But this form is found in the act of 1881, while the statute prescribing the form and contents of the notice in question is the act of April 6, 1885. It is to the latter act that we must look to ascertain what the notice should state. The motion to set aside the service, and to strike out the notice, was, therefore, properly overruled.

The grounds of the motion to dismiss the petition and to strike out the report of the commissioners were that the proceedings contemplated the draining of some small lakes, and that the commissioners had located certain branch ditches not petitioned for, and had assessed appellant for their construction. These objections to the petition and report were not well taken. The petition did not ask for the drainage of any lake. The line of drainage passed through several small bodies of water described as lakes, and, as they were natural water basins, or water courses, on the route proposed, it was lawful to drain the lands above into and through them. *Mitchell v. Bain*, 142 Ind. 604; citing *Hebron, etc., Co. v. Harvey*, 90 Ind. 192, 46 Am. Rep. 199; *Munkres v. Kansas City, etc., R. Co.*, 72 Mo. 514. Even if the drainage of one or more small lakes, and the reclamation of the land covered by them, was intended, we are not prepared to say that this circumstance would vitiate the

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proceedings, or deprive the court of jurisdiction over their subject-matter. In regard to the branch drains, the petition expressly demanded that such other lateral and branch ditches as might be deemed necessary by the drainage commissioners should be laid out and reported by them; and the statute authorized the commissioners to determine the best and most suitable methods of drainage. §5624 Burns 1894. There was no error in overruling the motion to dismiss the petition, and to strike out the report.

The next error assigned is the overruling of the application of appellant for a change of judge. It is contended by the appellees that the supposed error cannot be considered on this appeal because it was not presented to the trial court by a motion for a new trial. The general rule, undoubtedly, is that the denial of the application for a change of judge must be presented in a motion for a new trial, and that it cannot be specified as an independent error. *Horton v. Wilson*, 25 Ind. 316; *Crowfoot v. Zink*, 30 Ind. 446; *Knarr v. Conaway*, 53 Ind. 120; *Berlin v. Oglesbee*, 66 Ind. 308; *Walker v. Heller*, 73 Ind. 46; *Scanlin v. Stewart*, 138 Ind. 574.

The provisions of the civil code in relation to a motion for a new trial are applicable to proceedings under the statute concerning drainage. *Neff v. Reed*, 98 Ind. 341; *Crume v. Wilson*, 104 Ind. 583.

It has been held that a party does not waive an objection which he has had no opportunity of making, and, therefore, that the rule requiring the alleged error to be first presented by a motion for a new trial does not apply where no new trial can be had. *Shoemaker v. Smith*, 74 Ind. 71.

In the present case, the remonstrances of the appellants having been stricken from the files, the judgment was rendered as upon a default. §5625 Burns 1894.

But the rendition of a judgment by default is not a trial in the sense that a party may afterwards apply for a new trial. *Fisk v. Baker*, 47 Ind. 534. As the appellant Good-

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rich was not in a situation to ask for a new trial, the specification of the refusal of the court to grant a change of judge was properly assigned as an independent error.

The ruling complained of, however, was not erroneous. The motion to strike out the remonstrance of the appellant had been heard, and submitted to the court for decision. The judge, who had the question under advisement, had the right to decide it, and, after submitting the question for decision, the appellant could not retract his consent to such submission. But, in addition to this, the question whether the appellant had the right to demand a change of judge depended upon the decision upon the motion to strike out his remonstrance, and the determination of the latter motion necessarily preceded a ruling upon the motion for a change of judge. The remonstrance was ordered to be stricken out. This was right. It was not filed within ten days after the service on the appellant of the notice of the hearing of the report. The appellant had no standing in court, and no right to file an application for a change of judge. §5625 Burns 1894.

Lastly, the motion in arrest, being founded upon the alleged insufficiency of the notice and the supposed irregularities in the petition and the report of the commissioners, was, for the reasons hereinbefore stated, properly overruled. There being no error in the record, the judgment is in all things affirmed.

LUMPKIN v. RODGERS ET AL.

[No. 18,814. Filed October 8, 1900.]

WILLS.—Precatory Clause.—Trusts.—A testator by the first clause of his will gave to his wife an absolute title to all of his property. By the second and third clauses he expressed the desire that the business should be so conducted that all of their children, or their heirs, should finally share equally in the distribution of the property, and advised that his wife should, at some suitable time, call to her counsel two or three good discreet men to assist her in making a proper and equitable division of the real estate and other property

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164	68
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among all the children, retaining, however, if she chose to do so, the title and possession of said property to herself until after her death. In the fourth clause it was provided that nothing in the above should be construed to affect a perfect and indefeasible title in the wife "which this will conveys to her." *Held*, that the wife took a fee simple estate in the property devised.

From the Fountain Circuit Court. *Affirmed*.

H. S. Clark and *C. M. McCabe*, for appellant.

L. Nebeker and *D. W. Simms*, for appellees.

MONKS, J.—The determination of this appeal depends upon the construction of that part of the will of John Adamson, deceased, which reads as follows:

(1) "I, John Adamson, of the county of Fountain, and State of Indiana, do make and publish this my last will and testament: I give and bequeath to my wife, Nancy Adamson, all my property, both real and personal, of which I am now possessed, requiring her to pay all my just debts and funeral expenses." (2) "It is my desire that the business be so conducted that all of our children, or their heirs, shall finally share equally in the distribution of our property." (3) "I would advise that the said Nancy Adamson shall at some suitable time call to her counsel two or three good discreet men to assist her in making a proper and equitable division of the real estate, as well as other property that she may think proper, among all the children aforesaid, retaining, however, if she choose so to do, the title and possession of said property to herself until after her death." (4) "Nothing in the above shall be construed to affect a perfect and indefeasible title to her, the said Nancy Adamson, which this will conveys to her, to all the said property, both real and personal, with the right to control, sell, and convey the same at her pleasure." The clauses in the will are not numbered, but for convenience and reference we number the same.

The controlling question in this case is as to the nature of the estate devised to Nancy Adamson. If the estate de-

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vised is a fee, the judgment of the court below was right; if not, the judgment must be reversed.

It is a fundamental rule in the construction of wills that the intention of the testator, if not inconsistent with some established rule of law, must control. *Mulvane v. Rude*, 146 Ind. 476, and cases cited.

It is settled law in this State that a devise in fee, clearly and distinctly made, or necessarily implied, cannot be cut down or modified by subsequent provisions not clearly and distinctly manifesting the testator's intention to limit such devise. *Mulvane v. Rude*, 146 Ind. 476, 481, and cases cited; *Mitchell v. Mitchell*, 143 Ind. 113, 116; *Allen v. Craft*, 109 Ind. 476, 479, 480, and cases cited. The first clause in said will, standing alone, would without doubt give a fee simple absolute to the widow. §2737 Burns 1894, §2567 R. S. 1881 and Horner 1897; 4 Kent Com. (13th ed.) 535; *Mulvane v. Rude*, *supra*, 480, 481, and cases cited; *Rogers v. Winklespleck*, 143 Ind. 373, 374.

Does the language following that creating the fee have the effect to cut down the estate so given? Appellant contends that, under the will, the widow held the property in trust, to the end that their children or their heirs shall finally share equally in the distribution of the same. The rule in regard to precatory trusts, as stated in 27 Am. & Eng. Ency. of Law, 40, and approved in *Mitchell v. Mitchell*, 143 Ind. 113, is as follows: " 'In order that a trust may arise from the use of precatory words, the court must be satisfied from the words themselves, taken in connection with all the other terms of the disposition, that the testator's intention to create an expressed trust was as full, complete, settled and sure as though he had given the property to hold upon a trust declared in express terms in the ordinary manner.' * * *

It is difficult, therefore, to formulate any general rule upon the subject. The intention of the testator is the main thing; but how is that to be determined. In the first place, the entire will should be considered in determining the inten-

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tion, and the precatory words should not only be of such a character as to indicate that the testator intended a trust to be created, but they must also be consistent with the other provisions of the will—that is, they must not be repugnant to positive provisions by which the same property is devised or bequeathed absolutely or without limitation. Secondly, the words should be given their natural and ordinary meaning, unless there is something to show that they were intended to be taken in a different sense.” See, also, *Rogers v. Winklespleck*, 143 Ind. 373; *Fullenwider v. Watson*, 113 Ind. 18, and cases cited.

The ordinary method of creating the trust estate, for which appellant contends, would have been an express provision vesting in the widow such title; but, instead of doing so, the testator, in the first clause, gave her an absolute title to said property, and in the fourth clause provided in express terms that nothing contained in clauses two and three “shall be construed to affect a perfect and indefeasible title to her, the said Nancy Adamson, which this will conveys to her, to all the said property, both real and personal, with the right to control, sell, and convey the same at her pleasure.” The intention of the testator, as shown by the first clause, and clearly and unmistakably announced in the fourth clause, was to give the widow the absolute title to said property. The words “with the right to control, sell, and convey the same at her pleasure”, contained in clause four, created no substantive right, for the reason that such right was an incident of the absolute title before devised, but the same give emphasis to the estate before given. *Chase v. Salisbury*, 73 Ind. 506, 509; *Fullenwider v. Watson*, *supra*. It is evident that the words used in said will do not indicate that the testator’s intention to create “an expressed trust, was as full, complete, settled, and sure as though he had given the property to hold upon a trust declared in express terms, in the ordinary manner.” We do not think that said clauses two and three

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should be construed as imperative, but as advisory only. If they are construed as imperative, then they are not consistent with, but are clearly repugnant to, clauses one and four, and therefore violate that part of the rule above stated, which requires that "they must not be repugnant to other positive provisions by which the same property is devised or bequeathed absolutely or without limitation."

It was the intention of the testator, as clearly expressed in the first clause, and repeated with particularity in the fourth clause, that his widow was to have the absolute title to said property. The language used in said clauses, two and three, if construed to be imperative, imposed restraints upon the estate, which is a violation of a settled rule of law. *Rusk v. Zuck*, 147 Ind. 388, 393. *Fullenwider v. Watson*, 113 Ind. 18, 19; *Allen v. Craft*, 109 Ind. 476.

As was said in *Rusk v. Zuck*, 147 Ind. 388, 393: "The correct test of the effect of language apparently at variance with other parts of a devise is whether the intent of the testator was to give a smaller estate than the words making the gift, standing alone, without considering the limiting clause, import, or to impose restraints upon the estate given. The first is lawful and effective, for the reason that the testator's intention is the controlling consideration in the construction of the will. If the language, however, is used to impose a restraint on the estate granted, it is rarely, if ever, effective for the reason that even a clear intention cannot be permitted to overthrow the settled rules of law by depriving an estate of any of its essential legal incidents." *Mulvane v. Rude*, 146 Ind. 476. It follows that the widow, Nancy Adamson, took a fee simple estate in said real estate, and the judgment must be affirmed.

Judgment affirmed.

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155 290
168 645

THE STATE v. WINSTANDLEY ET AL.

[No. 18,682. Filed October 4, 1900.]

EMBEZZLEMENT.—Indictment.—An indictment which charged that defendants, being officers, agents and employes of a bank, and having access to and control and possession of money, appropriated the same to their own use, but not averring that defendants had possession of such money by virtue of their employment, was insufficient to charge embezzlement under §2022 Burns 1894.

From the Clark Circuit Court. *Affirmed.*

W. L. Taylor, Attorney-General, H. C. Montgomery, W. C. Utz, J. K. Marsh, F. E. Matson, Merrill Moores and C. C. Hadley, for State.

A. Dowling, C. D. Kelso, J. V. Kelso, M. Z. Stannard, W. H. Watson, C. L. Jewett and H. E. Jewett, for appellees.

HADLEY, J.—Indictment in two counts for embezzlement. Motion to quash each count sustained. The State appeals.

In substance, it is charged in the first count that at, etc., and on, etc., William L. Breyfogle, Isaac S. Winstandley, and Clarence J. Frederick, each then and there being officers, agents, and employes of a certain banking company known as the New Albany Banking Company, which banking company had been theretofore organized under the laws of the State of Indiana, and which said banking company was then and there carrying on a banking business in the city of New Albany, Indiana, the same Breyfogle, Winstandley, and Frederick, "having access to, control and possession of, a large sum of money, to wit, the sum of \$76,108.70, of the value of \$76,108.70, to the possession of which the said New Albany Banking Company at said time was entitled; that they, the said William L. Breyfogle, Isaac S. Winstandley, and Clarence J. Frederick, while in such employment and acting as officers, agents and em-

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ployes of said New Albany Banking Company, as aforesaid, did then and there unlawfully, feloniously, wilfully, and fraudulently take, purloin, secrete, misapply, and appropriate to their own use, and to the use of William S. Winstandley, the said sum of \$76,108.70, the said sum of \$76,108.70 then and there being deposited with, and held by, the said New Albany Banking Company; contrary," etc.

The second count is the same as the first, except that in the second the bank is alleged to be incorporated.

The gist of the charge is that the defendants, being officers, agents, and employes of the bank, and having access to, and control and possession of, a large sum of money, to which the bank was entitled to possession, while in such employment, and acting as such officers, agents, and employes, did unlawfully and fraudulently take and appropriate to their own use, etc. It will be noted that it is not averred that the defendants had access to and control and possession of the money appropriated by them, by virtue of their employment. It is stated by the State's attorney that the prosecution is under §2022 Burns 1894, §1944 Horner 1897; and, to make out a crime under this section, it must appear that the act charged was not criminal before the passage of the act of 1865 (Acts 1865 S. S., p. 204), the substance of which act is carried into §2022, *supra*, in the compilation of 1881. *Smith v. State*, 28 Ind. 321. See, also, *State v. Wingo*, 89 Ind. 204.

If the duties of the defendants, as officers, agents, and employes of the bank were such as had no connection with the money of the bank, but only afforded them an opportunity to reach and take it, and, without authority of the bank, they did take possession and appropriate it, the act would have been larceny at the time of the passage of the act of 1865, and hence not indictable as the new crime of embezzlement created by that act. Embezzlement is the fraudulent conversion of property by a person to whom it has been entrusted. Bouvier's Dictionary; Anderson's

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Dictionary. Therefore, in charging embezzlement under §2022, it is necessary to show some right, trust, or duty arising from the employment in respect to the possession of the property appropriated.

As was said by this court in *Colip v. State*, 153 Ind. 584, at page 586: "The access to, control, or possession of property of the servant or employe intended by the statute, is such access to, control, or possession as arises from the nature of the employment with reference to the particular article of property feloniously appropriated. Something more than mere physical access, or opportunity of approach to the thing, is required. There must be a relation of special trust in regard to the article appropriated, and it must be by virtue of such trust that the servant has access to, or control, or possession of it."

We are not advised by the indictment in what capacity the defendants were employed by the bank; whether either was president, cashier, or teller. For aught that appears, they may have been directors, book-keepers, or any other class of employes. They may also have been, respectively, president, cashier, and teller. We may as reasonably infer the one as the other. Such a state of uncertainty is not permitted in criminal pleading. For failure, therefore, to show that the defendants had access to and control and possession of the money appropriated, by virtue of their employment, the indictment is insufficient. See *State v. Winstandley*, 154 Ind. 443. Judgment affirmed.

Dowling, J., did not participate.

BLOOM v. THE STATE.

[No. 19,229. Filed October 4, 1900.]

CRIMINAL LAW.—*Indeterminate Sentence Law*.—The act of February 26, 1897 (Acts 1897 p. 69), known as the indeterminate sentence law, is valid. p. 294.

SAME.—*Indeterminate Sentence Law*.—*Verdict*.—A verdict finding defendant guilty of manslaughter is not rendered void because it con-

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tains the statement that defendant "is about 55 years old," since the finding of age has relation to the place, not the justice, of the punishment. *p. 294.*

CRIMINAL LAW.—Manslaughter.—Evidence.—Sufficiency.—Defendant rented to deceased a stall in his barn in which to keep a horse a part of each day. Deceased brought feed for his horse which, without objection from defendant, he kept in that part of the barn where the latter kept his feed. In opening the barn door, deceased had to free a hasp held over a staple by a pin. Defendant, becoming suspicious that deceased was stealing feed, concealed himself in the barn loft and saw him taking it. On the following night defendant shot and mortally wounded deceased while in the act of stealing hay. There was no evidence that defendant's feed was kept in a place that was not openly accessible from the stall rented by deceased. *Held*, that the evidence is sufficient to sustain a conviction. *pp. 294, 295.*

SAME.—Admissions.—Instruction.—Though, in the trial of a criminal case, the jury "may determine the law for themselves," the court is not invading the province of the jury in stating to them the law as applicable to the facts as sworn to by defendant. *pp. 295, 296.*

SAME.—Instruction.—The following instruction: "If you find," etc., stating the facts that constitute voluntary manslaughter, "you should find the defendant guilty of voluntary manslaughter," is not erroneous, as being an invasion of the province of the jury. *p. 296.*

SAME.—Homicide.—Instruction.—Where, on the trial of one charged with homicide, there was no evidence that would justify a claim that the homicide resulted from an attempt to prevent a burglary, an instruction as to the effect of burglary as a defense was error prejudicial to the prosecution, and of which the defendant could not complain. *pp. 296, 297.*

SAME.—Admissions.—Harmless Error.—Error in admitting testimony of admissions of defendant which were obtained by coercion is cured by the defendant testifying to the same facts. *p. 297.*

TRIAL.—Misconduct of Juror.—Appeal.—Where misconduct of a juror was alleged in a motion for a new trial, and the evidence thereof as presented to the trial court was conflicting, such evidence will not be reviewed on appeal. *p. 297.*

From the Huntington Circuit Court. *Affirmed.*

J. B. Kenner and U. S. Lesh, for appellant.

W. L. Taylor, Attorney-General, *J. S. Branyan*, *H. G. Colerick*, *Merrill Moores* and *C. C. Hadley*, for State.

BAKER, C. J.—Appellant was convicted of manslaughter. Two rulings are presented as erroneous,—denying a new

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trial, and pronouncing judgment under the indeterminate sentence law.

It has been decided repeatedly that the indeterminate sentence law is valid. *Miller v. State*, 149 Ind. 607; *Skelton v. State*, 149 Ind. 641; *Vancleave v. State*, 150 Ind. 273; *Wilson v. State*, 150 Ind. 697; *Davis v. State*, 152 Ind. 145. The majority of the court see no reason for departing from those decisions.

Objection is made to the verdict because it states that the defendant "is *about* fifty-five years old". Appellant was sentenced to the penitentiary. If in fact he is under thirty, he may take steps to be transferred to the reformatory. *Colip v. State*, 153 Ind. 584. The finding of age has relation to the place, not the justice, of the punishment.

Appellant contends that the verdict is not sustained by sufficient evidence. By the appellant's own testimony the conviction was justified. He owned a farm. Bess, the deceased, was an oil-well driller. About a week before the homicide Bess was employed near appellant's farm. His hours of service were from noon till midnight. He lived several miles distant from his place of employment. He drove to and from his work. He went to appellant to engage a place in which to keep his horse and buggy. Appellant rented Bess a stall in his barn for the horse, and permitted the buggy to stand in the barn-yard. Appellant states that when he rented the stall to Bess he did not give him any permission to go into the part of the barn where appellant kept his corn, oats, and hay. Bess brought feed for his horse with him each day in a sack. This feed, with appellant's acquiescence, was put by Bess outside the stall in the general part of the barn where appellant had his hay, etc. At Bess's request, appellant fed the horse in the evening from Bess's sack. In a day or two after the arrangement was made, appellant began to miss some of his corn and hay. He suspected Bess. He put marked wooden pins in the pith of his cobs of corn, and found that Bess was

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bringing back this marked corn in his sack as feed for his horse. Appellant thus had circumstantial proof that Bess, upon quitting work at midnight, went to the barn to get not only his horse but also appellant's corn. To have direct ocular proof, appellant and his son the night before the homicide concealed themselves in the barn-loft and watched. They saw Bess and a companion named Burke take corn and oats and chickens, put them in Bess's buggy, and drive away. The next day appellant did not have Bess arrested, nor forbid him the use of the barn, but went to town and got a gun with which "to mark the fellows that were stealing from him". That night he and his son again concealed themselves in the barn-loft and watched. Bess came, opened the barn, harnessed his horse, tied up a bundle of appellant's hay in the barn, took it out into the barn-yard, and was putting it into his buggy when he was shot. Appellant watched these doings from the loft. When Bess went out with the hay, appellant stepped to the side of the barn-loft and fired through an opening. He aimed at Bess's feet, but stepped back as he shot and the charge struck Bess at the knee. The wound proved fatal. There was no evidence that appellant's oats, corn, or hay was kept in a place that was not openly accessible from the stall rented to Bess. In opening the barn-door Bess had to free a hasp held over a staple by a pin.

Error is predicated on the giving and refusal of instructions. In the course of a very elaborate charge, the court used these expressions, of which complaint is made: "The theory of the defense is that the deceased, James Bess, was in the act of stealing or had stolen property from the barn of the defendant. * * * If the deceased had a lawful right to enter the barn of the defendant, and while in such barn committed a larceny or theft of the property of the defendant, and was outside the barn making off with it, then the defendant had no legal right to shoot him. There is no law that will justify the killing of one person by an-

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other for the crime of petit larceny. * * * If you find from the evidence that Bess and the defendant had agreed that Bess should keep his horse in defendant's barn, then Bess at the time he was shot was in a place where he had a right to be, and if you find that at the time Bess was stealing a small bundle of hay, and defendant knew that he had no other purpose, he was stealing by mere trespass, and if the owner of the property shot and killed him, he can not avail himself of the defense that Bess was so stealing." Appellant insists that the court infringed upon the right of the jury to decide the facts and determine the law. The court assumed no fact that was not clearly established by appellant's own evidence. A party will not be heard to complain of the court's acceptance of his own testimony as true. The court stated correctly the law applicable to the facts admitted by appellant. Though in this State the jury "may determine the law" for themselves, the court is not invading the province of the jury, but is discharging an imperative duty, in stating to the jury the law applicable to the facts.

The court charged the jury: "If you find," etc., stating the facts that constitute voluntary manslaughter, "you should find the defendant guilty of voluntary manslaughter." Here, too, appellant is mistaken in claiming that the court deprived the jury of the right to determine the law by advising them that they ought to convict the defendant if they found he had done the acts denounced by the statute as felonious.

The court at great length informed the jury of the circumstances under which a person has the right to take life in defense of his person and property or to prevent the commission of a felony. Arguments are made that these instructions prove that the court was wrong in that part of the charge hereinabove set forth which excludes the defense that appellant shot to prevent the commission of a burglary, and that the two lines of instructions must have tended to

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confuse the jury. The evidence did not require these last instructions. The testimony of appellant has been referred to. The other evidence of the defense and that of the prosecution correspond with appellant's account of the homicide. There was no evidence that would justify a claim that the homicide resulted from an attempt to prevent the commission of a burglary. There was no burglarious breaking, even if Bess, before he entered the barn, intended to commit a larceny therein. If it was error to submit to the jury the question whether or not the shot was fired to prevent the commission of a burglary, it was an error prejudicial to the prosecution, not to the defense. Appellant could only have profited by any confusion in the minds of the jury, as to the law, for on the facts stated by appellant he was guilty under the law.

The court did right in excluding evidence that Bess was accustomed to go armed and was a dangerous man.

Appellant reserved exceptions to the prosecution's evidence of appellant's admissions. Objection was made to the introduction of this evidence on the ground that the admissions were obtained by coercion. The court heard evidence as to the circumstances under which the admissions were made, and then overruled the objection. It is unnecessary to review that ruling, because, even if it was erroneous, appellant cured the error by going upon the stand and testifying to the same facts.

Misconduct of a juror was alleged in the motion for a new trial. Appellant filed affidavits in support of the charge, the juror filed his affidavit denying it, and the court further heard the affiants orally. The juror denied the charge explicitly, but appellant claims that the cross-examination of the juror virtually destroyed his direct testimony. This was for the court to decide. There was evidence to support the finding that the juror was not guilty of the alleged misconduct, and this court will not undertake to determine where the preponderance lay.

Judgment affirmed.

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on appeal. *Brown v. Armfield*, ante, 150; *Allen v. Gavin*, 130 Ind. 190; *Reid v. Houston*, 49 Ind. 181. The precipe directed the clerk to certify "plaintiff's (appellant's) bill of exceptions number two and plaintiff's (appellant's) bill of exceptions number three and they are copied into the transcript, but appellant's bill of exceptions number three is not mentioned in said precipe. It follows, therefore, under the rule stated, that said bill of exceptions number three, though copied into the transcript, forms no part of the record, and the matters set forth therein cannot be considered on this appeal. But if said bill of exceptions was properly a part of the record, as the same does not show affirmatively that it contains all the evidence given on the trial of said motion, we cannot say that the court erred in overruling the same. §823 Elliott's App. Proc.

Moreover, if said bill of exceptions affirmatively showed that it contained all the evidence given on the hearing of said motion, we would be compelled to hold that the motion was properly overruled, for the reason that the only evidence set forth in said bill to sustain said motion was oral, which, under the long and well settled rule in this State, is not sufficient to authorize the correction of a record. *Driver v. Driver*, 153 Ind. 88, and cases cited.

Appellant next insists that the conclusions of law are erroneous. It appears from the special finding that appellant, on April 13, 1894, sold and conveyed to the Advance Manufacturing Company certain real estate, upon which was located a furniture factory, for a consideration mentioned in the deed of \$22,850. Said deed was made subject to the taxes of 1894, and a mortgage to DePauw University for \$8,000, which said grantee assumed and agreed to pay as a part of said consideration for said conveyance. Said sale and consideration included, in addition to the real estate, lumber, and other material, machinery and appliances then upon and connected with said real estate, used in the manufacture of furniture. On the day of said sale and

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conveyance, the grantee paid \$5,000 in cash to appellant, and executed to him as the balance of the consideration therefor ten promissory notes for the aggregate sum of \$9,850, nine of said notes being for \$1,000 each, and payable respectively in one, two, three, four, five, six, seven, eight, and nine years, and one for \$850, payable within ten years after said date; and to secure the payment of said notes, executed a mortgage to appellant upon said real estate. In said mortgage the mortgagor agreed to keep the buildings on said real estate "insured for the benefit of the mortgagee and the DePauw University, as their interest may appear, to the amount of ——— thousand dollars." The mortgage in favor of the DePauw University contained a clause requiring that said property be kept insured for its benefit, to the amount of \$10,000. The mortgage to appellant provided that the "mortgagors can pay off the mortgage to DePauw University, and place another mortgage for a like amount on said real estate, which mortgage shall be prior to the lien of this mortgage". Said clause was the material part of the inducement and consideration conceded by appellant, the mortgagee, to, and demanded and accepted by the mortgagor, in the purchase of said property. When said sale was made, and deed and mortgage executed, the debt secured by the mortgage to DePauw University was past due, and by its terms liable to be foreclosed. Upon the consummation of said sale, the Advance Manufacturing Company entered into possession and commenced to operate said plant, in the manufacture of furniture, and continued so to operate the same until August 2, 1894, when the same was, to a large extent, destroyed by fire. When said fire occurred, the Advance Manufacturing Company was carrying insurance on the buildings and machinery, and all fixtures, apparatus, tools, and implements, used in connection with the business of the manufacture of furniture, and finished and unfinished stock, lumber, and materials in use in said plant, to the amount of \$22,700 in

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favor of the DePauw University and appellant, as their interests might appear. Said Advance Manufacturing Company realized from insurance on property covered by said mortgages something over \$10,000. Out of the whole amount of insurance, including that on property not covered by said mortgages, received in the adjustment of the losses caused by said fire, the mortgage debt to DePauw University, amounting to \$8,496, was fully paid, and payments were made on the indebtedness secured by the mortgage to appellant, amounting to \$6,860.49, leaving only \$2,989.51 of the principal unpaid, no part of which balance will become due prior to May, 1901. On December 31, 1894, after said payments had been made, and before any buildings had been reconstructed, or machinery replaced, but after this suit had been commenced by appellant and *lis pendens* notice filed, said Advance Manufacturing Company executed a mortgage on said real estate, covered by appellant's mortgage, to appellee, Robert Denny, as trustee, to secure the sum of \$8,000, said indebtedness to become due, eighteen months after December 31, 1894. All of said sum of \$8,000, and about \$2,700 more, making in all about \$10,700, was used by said Manufacturing Company in the construction of new buildings in the place of those destroyed by fire, and in the reconstruction of buildings not entirely destroyed, and in purchasing new machinery properly to equip said plant for the manufacture of furniture. That the buildings now upon said real estate are worth as much as were all the buildings on said ground, prior to, and at the time of the fire. The machinery now in said plant, including boilers, engine, pumps, belting, shafting, pulleys, piping, and machines, in the aggregate, are worth as much as was the like machinery in the plant, prior to and at the time of the fire. That the ground covered by appellant's mortgage is of greater value, than when sold by appellant to said company, but not of a value equal to the debt of said company to appellant. That said plant can pro-

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duce as much furniture in a given time, with the same labor, as the plant mortgaged to appellant, and is of equal rental value. That the same as a whole is as valuable as the plant mortgaged to appellant.

The plant as now constructed is insured for \$5,500, being payable to Robert Denny, trustee, and appellant. That said manufacturing company fully kept and performed the obligations it assumed, concerning the insurance upon the property contained in the mortgage executed to appellant. That the payment of the balance of the indebtedness due appellant is as well and fully secured as was the payment thereof prior to and at the time said fire occurred. In December, 1894, after said fire, and before the erection of the buildings on said real estate, appellant commenced this action, and at the same time filed a *lis pendens* notice in the office of the clerk of Marion county. The owners and holders of the notes secured by said mortgage to Denny, trustee, were, at the time of the execution thereof, stockholders and officers of said Advance Manufacturing Company. Said Denny, trustee, was at said time, and for some time prior thereto had been the attorney for said company, and had full knowledge of the facts herein stated.

Upon the facts found, the court stated conclusions of law in favor of appellees, to the effect "that the mortgage executed to Denny, trustee, is a valid lien on the property therein described, and is prior and superior to the lien of the mortgage executed to appellant." As appellant commenced this action to enjoin the execution of the mortgage to Denny, trustee, and after said mortgage was executed filed a supplemental complaint to declare his mortgage a lien on said real estate, prior and superior to the mortgage to Denny, trustee, the burden of proof was upon him. Unless the facts found show that appellant's mortgage is a prior lien on said real estate, the conclusions of law are not erroneous. It is settled law that the holder of a mortgage may waive the prior lien of his mortgage, by an agreement

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that if another mortgage is subsequently executed it shall be the first lien on the mortgaged real estate. 1 Jones on Mort., §608; *Walters v. Ward*, 153 Ind. 578, 582.

The court found that the provision in appellant's mortgage for the execution of another mortgage on the payment of the mortgage to DePauw University, and that the same should be a lien on said real estate prior and superior to appellant's mortgage, was the material part of the inducement and consideration for the purchase of said real estate from appellant. There was, therefore, sufficient consideration to support said provision. Appellant urges, however, that said agreement contemplated the continued existence of the buildings and machinery covered by said mortgages, and that after their partial destruction by fire the same was not binding upon him. It has been held that, when the performance of a contract depends upon the continued existence of a thing, or such continued existence was assumed as the basis of the agreement, the destruction of the thing puts an end to the obligation. 7 Am. & Eng. Ency. of Law, (2nd ed.) 115, 116, and cases cited; 1 Beach on Contracts, §773; *Wells v. Calnan*, 107 Mass. 514, 9 Am. Rep. 65; *Powell v. Dayton, etc., R. Co.*, 12 Ore. 488. To what extent this doctrine, if correct, applies in this case, we need not determine, for the reason that it cannot be said that the agreement in regard to the new mortgage contemplated the continued existence of the buildings and machinery covered by appellant's said mortgage. All that appellant was interested in when he took his mortgage was that his security should not be materially impaired, that is, it should be kept substantially as good as when he accepted said mortgage subject to the mortgage to DePauw University. Even if it would be proper to hold that the parties, when said provision was made in appellant's mortgage, contemplated that the buildings and machinery, if destroyed or damaged by fire, should be so far repaired or replaced by other buildings and machinery that appellant's security would be sub-

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stantially as good as it would have been if the fire had not occurred, a question we need not and do not decide, the conclusions of law are not erroneous. The balance of the indebtedness secured by said mortgage to appellant, after the payment of \$6,850.49 thereon after the fire, was \$2,989.51, and the facts found by the court clearly show, and the court so found, that it is as well and fully secured as it was before and at the time of the fire. It is unnecessary, therefore, to decide as to the correctness of said conclusions, if the facts found had shown that no buildings had been erected or repaired since the fire, or, if erected, that the plant was worth materially less than before the fire.

Appellant earnestly insists that the evidence was not sufficient to sustain the special findings. That insuring the buildings and machinery on said real estate for \$5,500, at the time of the execution of the mortgage to Denny, trustee, was not a compliance with the agreement contained in appellant's mortgage to keep the buildings on said real estate insured. The part of appellant's mortgage in regard to insurance provides that the "mortgagor ——— will keep the buildings thereon insured for the benefit of the mortgagees and the DePauw University, as their interest may appear, to the amount of ——— thousand dollars." The blank before the word thousand not being filled, so as to show how many thousand dollars insurance was to be carried, whether one or more, said provision is incomplete. Appellant's mortgage, therefore, contains no agreement requiring the manufacturing company to insure said property for any amount. *Palmer v. Poor*, 121 Ind. 135, 6 L. R. A. 469; *Wiltfong v. Schafer*, 121 Ind. 264. See, also, *Coleman v. Coleman*, 78 Ind. 344, 347-349. But even if it could be construed to require said company to insure said property for \$1,000, the insurance for \$5,500, payable to Denny, trustee, and appellant, is a sufficient performance of the same. We have read the evidence, and, while conflicting,

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the same fully sustains all the findings of the court, which are necessary to sustain the conclusions of law. The fact that some of the findings made by the court are not sustained by sufficient evidence does not entitle appellant to a new trial if such findings are not necessary to sustain the conclusions of law.

It is urged that the court erred in admitting certain testimony, but as the page and line of the record where said ruling, if any, appears, is not stated by appellant, the court, under a long established rule, will not search for the same. Ewbank's Manual, §183, p. 277; *State v. Winstandley*, 151 Ind. 495, 501, 502, and cases cited.

An affidavit was filed in support of certain causes assigned for a new trial. It is the law that unless such affidavits are made a part of the record, in a civil case, by a bill of exceptions, or order of court, said causes for a new trial cannot be considered. *Hoskinson v. Cavender*, 143 Ind. 1, 2, and cases cited. *Forsyth v. Wilcox*, 143 Ind. 144; Ewbank's Manual, §50, p. 76. The court did not err in overruling appellant's motion for a new trial.

It is claimed by appellant that the special findings are so vague, uncertain, and defective on their face that no judgment can be rendered thereon, and that the court, therefore, erred in overruling his motion for a *venire de novo*. If the special findings are sufficient to support the conclusions of law, or to form the basis of a judgment on the issues involved, said motion was properly overruled. 2 Woolen's Trial Proc. §4206. Disregarding all evidentiary facts, and the findings without the issues, the special findings are not contradictory, vague, or uncertain, but are clearly sufficient to sustain the conclusions of law. It is evident, therefore, from what has been said concerning the correctness of the conclusions of law, and the motion for a new trial, that the court did not err in overruling said motion for a *venire de novo*.

Finding no available error in the record, the judgment is affirmed.

Denton v. State.

DENTON v. THE STATE.

[No. 19,078. Filed October 5, 1900.]

155	307
169	397

CRIMINAL LAW.—*Indictment.—Indorsement by Foreman of Grand Jury.*—An indictment which was not indorsed “a true bill” over the signature of the foreman of the grand jury who returned it into court is insufficient.

From the Orange Circuit Court. *Reversed.*

S. R. Lambdin, for appellant.

W. L. Taylor, Attorney-General, *T. M. Honan*, *Rowland Evans*, *Merrill Moores* and *C. C. Hadley*, for State.

JORDAN, J.—Appellant was indicted by the grand jury of the Orange Circuit Court for violating §9 of an act of the legislature approved March 6, 1897, entitled an act “regulating the taxing of dogs,” etc. Acts 1897, p. 178.

A motion to quash the indictment was overruled, and upon a trial by the court appellant was convicted of the charge, and fined in the sum of \$1. From this judgment he appeals, and assigns as error the action of the trial court in denying his motion to quash the indictment. The constitutional validity of the statute upon which this prosecution is based is assailed.

The indictment is clearly bad, for the reason alone that it does not appear to have been indorsed as a true bill over the signature of the foreman of the grand jury who returned it into court. This the statute requires, and the record on appeal to this court must affirmatively disclose that fact. The motion to quash the indictment should have been sustained for this reason. *State v. Buntin*, 123 Ind. 124; Gillett’s Crim. Law (2nd ed.), §116, and cases there cited.

As this infirmity in the indictment requires a reversal of the judgment, we do not deem it necessary to decide the questions relative to the constitutional validity of the stat-

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ute, as they are not essential to a disposition of the appeal.

The judgment is reversed, and the cause remanded to the lower court.

YEOMAN ET AL. v. SHAEFFER.

[No. 18,761. Filed June 6, 1900. Rehearing denied Oct. 5, 1900.]

APPEAL AND ERROR.—*Clerk's Certificate.*—*Drains.*—The certificate of the clerk to the transcript in an appeal in a drainage proceeding that the transcript contains true and complete copies of all the papers introduced and entries made in said cause is insufficient, as required by §662 Burns 1894, as it does not show that all papers pertaining to the case are contained in the transcript. *p. 310.*

SAME.—*Separate Assignments of Error.*—*Drains.*—In a proceeding for the construction of a drain, under §5655 *et seq.* Burns 1894, the rights of each party remonstrating must be separately determined by the jury, and if a new trial is desired by one or more of the remonstrators, who are the owners of separate tracts of land, a separate motion therefor must be filed, and, upon appeal from the action of the court in overruling such motions for a new trial, a separate assignment of error should be filed by each landowner. *p. 311.*

From the Jasper Circuit Court. *Affirmed.*

B. F. Ferguson, J. E. Wilson and E. B. Sellers, for appellants.

F. Foltz, C. G. Spitler, H. R. Kurrie and W. E. Uhl, for appellee.

DOWLING, J.—This is a proceeding under the statute to obtain the construction of a public tile drain through certain lands in Jasper county. §§5655, *et seq.*, Burns 1894. The petition therefor was filed by the appellee with the board of commissioners. It alleged, among other things, that the ditch would be of public utility; that it would conduce to the public health; that it would drain the lands of the petitioner and of other owners, and render them fit for agricultural purposes; that it would improve the public highways; and that the benefits to be derived from it would largely exceed the cost of its construction. The appellants, who were a part of such owners and occupants, filed their

155	308
156	384
155	308
166	143
166	144
167	129

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remonstrances, averring that each assessment made on the separate tracts of land owned by the appellants was too high as compared with the assessment against the lands of the appellee; that the assessments were too high as compared with the benefits; denying that the proposed ditch would be of public utility, would benefit the public health, or would benefit the public highways; denying, also, that the lands of the remonstrators would be benefited, etc. After various steps before the board, an order was entered directing the construction of the drain, and making assessments upon the lands benefited for the cost of the same.

An appeal to the circuit court was taken by the remonstrators, and the proceedings there resulted in a verdict for appellee. A motion for a new trial was made, and overruled, and a judgment was rendered establishing the drain, and making the necessary assessments for the cost of its construction upon the several tracts of land benefited. From this judgment, the remonstrators, James Yeoman, Robert Yeoman, Joseph Yeoman, Orpheus C. Halstead, Micha B. Halstead, Andrew J. Freeland, and Sarah E. Miller, appealed.

The only error assigned and discussed is the overruling of the motion for a new trial. The assignment is joint. The reasons stated in that motion were: (1) That the verdict was contrary to law; (2) that the verdict was not sustained by sufficient evidence; (3) error in permitting the introduction in evidence of the remonstrance filed by appellants to the third report of the reviewers; (4) error in submitting to the jury the interrogatories answered by them; (5) error in refusing to submit interrogatories requested by appellants; (6) error in giving instructions numbered three, seven, twelve, and fifteen, at request of appellee; (7) error in refusing to give instructions numbered two, three, four, five, six and seven, requested by appellants; (8) error as to appellants A. J. Freeland, Orpheus C. Halstead, Sarah E. Miller, Micha B. Halstead, and Joseph Yeoman,

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in refusing to give instruction number seven, requested by them; (9) error in permitting the jury to take to their room the third report of the reviewers; and (10) error in giving instructions numbered two, eleven, thirteen, fifteen, twenty-one, and twenty-two, of the court's own motion.

The preliminary objections are made by the appellee that the certificate of the clerk of the Jasper Circuit Court to the transcript is insufficient, and that, therefore, the appeal should be dismissed; and that the joint assignment of error presents no question on this appeal. The certificate states that the transcript contains true and complete copies of all the papers introduced and entries made in said cause. The precept directed the clerk to make a transcript of the proceedings, *papers on file introduced*, and judgment. By the provisions of the statute, all proper entries made by the clerk, and all papers pertaining to a cause and filed therein (except certain writs, depositions, and papers used as evidence) are deemed parts of the record, and may be included in the official certificate. §662 Burns 1894. The certificate in this cause is not such as the statute requires, and it does not purport that the transcript is complete. It fails to show that all of the papers pertaining to the cause and filed therein are copied in the transcript. The clerk certifies that only the papers *introduced* are copied. It cannot be assumed that all of the papers pertaining to the cause and filed are contained in the transcript. The certificate derives no aid from the precept filed by the appellants. It directed the clerk to copy "the papers on file introduced", but did not require him to include in the transcript any paper on file in the cause which was not introduced. But, even if we were disposed to disregard the defect in the clerk's certificate, the objection that, under the joint assignment of error, no question is presented here, would be fatal to this appeal. In proceedings for the construction of drains under the statute referred to, *supra*, it is clear that the rights of each party remonstrating must be

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separately determined by the jury in their verdict. §5672
Burns 1894.

If a new trial is desired by any one or more of the remonstrators, we think the correct practice is for each landowner to file a separate motion for a new trial. When the remonstrators are the owners of separate tracts of land, as they are in this case, and each is subjected by the verdict to a separate assessment for the construction of the drain, it cannot be said that they have any such joint interest in the proceedings as will authorize either a joint motion for a new trial, or a joint assignment of error. If any error is committed by the trial court in overruling a motion for a new trial, such error affects the landowners severally, and not jointly, and, upon appeal, a separate assignment of error should be filed by each.

Upon a joint assignment of error, one of several appellants cannot avail himself of errors which are not common to all his co-appellants, but affect him alone. Neither can parties who jointly assign error take advantage of errors which affect them severally, and not jointly. *Walker v. Hill*, 111 Ind. 223; *Carr v. Carr*, 137 Ind. 232; *Earhart v. Farmers Creamery*, 148 Ind. 79; *King v. Easton*, 135 Ind. 353; *Goss v. Wallace*, 140 Ind. 541; *Wall v. Bagby*, 126 Ind. 372; *Mills v. Hardy*, 128 Ind. 311; *Sibert v. Copeland*, 146 Ind. 387; *Armstrong v. Dunn*, 143 Ind. 433; *Breyfogle v. Stotsenburg*, 148 Ind. 552; Elliott's App. Proc., §§381-401, and cases cited in notes; *Crist v. Wayne, etc., Assn., ante*, 260.

Other objections to the record are pointed out by appellee, but it will not be necessary to consider them. Judgment affirmed.

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155	312
163	548
163	551
163	552

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. STICKLEY.

[No. 18,790. Filed October 9, 1900.]

ADVERSE POSSESSION.—*Claim of Ownership.—Evidence.*—In an action in ejectment the agreed statement of facts showed that M., the owner of certain real estate, conveyed a portion thereof to defendant railroad company, and that a part of such land was fenced in and used by plaintiff and her grantors who had been owners and in possession of an adjoining lot for twenty-five years, through a conveyance thereof from M., and that plaintiff and her grantees, believing that the line of said lot was several feet south of the true line, built a fence which extended the east line of said lot eighteen and one-half feet and the west line thirteen feet onto said strip so conveyed to the railway company, treating and believing the location of said fence to be the true line, and have had that much of said strip so fenced in, and have continuously used and occupied the same for more than twenty years last past next before the commencement of the action, *Held*, that the court was justified in finding that the deed from M. was made twenty-five years before the action was commenced, and that plaintiff and her grantors other than M. built and maintained the fence. *pp. 313, 314.*

SAME.—*Claim of Ownership.—Evidence.*—It was shown in an action in ejectment that plaintiff and her grantors built and maintained a fence on what they believed to be the true line of a lot, which included a strip of land belonging to defendant, and built a house with reference to such fence, and occupied the same for twenty-five years, treating the fence as the true boundary line. *Held*, that the evidence warranted the finding that plaintiff and her grantors claimed to own the land to the fence constructed by them. *pp. 314, 315.*

SAME.—*Railroads.—Highways.*—A railroad is not a public highway in the sense that lands acquired by the company for right of way or station purposes cannot be taken from it by adverse possession. *pp. 315, 316.*

From the Randolph Circuit Court. *Affirmed.*

N. O. Ross and G. E. Ross, for appellant.

J. S. Engle and W. G. Parry, for appellee.

BAKER, C. J.—Action by appellee in ejectment. Appellant filed a general denial. The court found generally for

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appellee and entered judgment accordingly. Appellant claims that its motion for a new trial should have been sustained on the ground that the finding is not sustained by sufficient evidence.

The case was submitted to the court upon an agreed statement of facts. The statement shows that in 1866 Sylvester Miller conveyed to the railway company certain described land. This land the company intended to use for depot purposes, but has not done so. It adjoins the north side of the right of way. In the year —, Miller platted a tract next north of the railroad lands. The statement proceeds: "That the plaintiff and her grantors have been the owners and in possession of lot number thirteen in said addition through a conveyance thereof from said Sylvester Miller for twenty-five years; that the south line of said lot thirteen is the north line of said strip so conveyed by said Miller to said railway company; that the plaintiff and her grantors, believing that the line of said lot thirteen was several feet south of the true line, built a fence which extended the east line of said lot eighteen and one-half feet and the west line thirteen feet onto said strip so conveyed to said railway company, treating and believing the location of said fence to be the true line, and have had that much of said strip so fenced in, and have continuously used and occupied the same for more than twenty years last past next before the commencement of the action, receiving the rents and profits therefrom; that (a few days before the filing of the complaint) the railway company tore down and removed the fence so built and maintained by the plaintiff and her grantors on said strip and built a fence on the true line between said lot thirteen and said strip, thus cutting her off from and depriving her of the use and possession of said strip so fenced in, held and used by her and her grantors for twenty-five years."

Appellant's first argument is this in substance. The evidence shows that "the plaintiff and her grantors" have oc-

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cupied the parcel in controversy for twenty-five years; Sylvester Miller was one of plaintiff's grantors; the evidence fails to show that plaintiff and her grantors other than Miller occupied the parcel twenty years, the limitation period; Miller was also defendant's grantor; therefore, Miller's occupancy was not adverse to defendant's grant from him, and plaintiff's case was not sustained by the evidence. The premise is untrue that the evidence fails to show that plaintiff and her grantors other than Miller occupied the parcel twenty years. The evidence is that the parcel in controversy was fenced in, held and used as part of lot thirteen for twenty-five years, and that "plaintiff and her grantors" owned and possessed lot number thirteen "through a conveyance thereof from said Sylvester Miller for twenty-five years". The court was justified in believing that Miller's deed was made twenty-five years before this action was commenced, and that plaintiff and her grantors other than Miller built and maintained the fence.

It is next contended that appellee's possession of the parcel in question was not adverse because she and her grantors never claimed to own any land beyond the true line of lot thirteen. If one intends to claim only to the true line wherever that may be, manifestly his actual possession of what he disclaims to own is not adverse. *Silver Creek, etc., Corp. v. Union, etc., Co.*, 138 Ind. 297. In the present case there was evidence to support a finding that appellee was not merely claiming to the fence if it should be found to be properly located, but was claiming the fence itself as the true boundary. For twenty-five years she and her grantors treated this fence as the true line. A part of the agreed statement is a map. This indicates that lot thirteen is used for residence purposes. The house is suitably located if the fence, built and maintained by appellee, is taken as the true boundary. The fence, erected by appellant, touches the southwest corner of the house, is about four feet distant from the southeast corner, is within two

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feet of the door in the south side of the house, and cuts off access from the house, through any door now constructed, to the major part of the yard. This evidence warranted the court in believing that the occupants claimed to own the parcel in question. The possession for twenty-five years was continuous, open, peaceable, and under a claim, established by evidence, that the old fence was the true boundary, a claim that appellant acquiesced in until it was too late to object. *Dyer v. Eldridge*, 136 Ind. 654; *Palmer v. Dosch*, 148 Ind. 10.

Appellant finally insists that land acquired by a railway company for right of way or station purposes can not be taken from it by adverse possession, because a railroad is a public highway, and because the statute forbids interference with the company's exclusive use. A railway company owes certain duties to the public, but it holds and uses its property for the profit of its stockholders. The cases holding that the statute of limitations affords no defense to actions for encroachment upon streets and roads, are inapplicable. A railroad is not a public highway in the sense that it belongs to the people. Railroad officers are not governmental agents whose laches creates no bar. It is true that, for reasons of public policy, a judgment creditor will not be permitted to destroy a railroad by cutting it into parcels on execution sales, if the company resists. *Farmers, etc., Co. v. Canada, etc., R. Co.*, 127 Ind. 250, 11 L. R. A. 740. If a company voluntarily disable itself to perform its duties to the public, its charter may be forfeited. But there is no reason why a railway company should not be permitted to dispose of land it does not need in fulfilling its public duties, or why, if it disposes of land it does need, it should not be compelled, if it wishes to avoid a forfeiture of its charter, to reacquire the land by purchase or condemnation. It is true that the statute entitles a railway company to take land in fee and forbids interference with the company's exclusive use. But the right to the exclusive use (which is

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an incident to every unqualified ownership) must be asserted. If one occupies adversely for twenty years land owned by a railway company, the statute of limitations should raise the presumption of a grant, for the company holds its lands for private gain as a private proprietor. The State confers the power of eminent domain to enable railway companies to perform efficiently their duties as common carriers. But it is not apparent why the State should be concerned in preventing investors in railway stocks from sustaining loss through the negligence of their agents. *Illinois, etc., R. Co. v. Houghton*, 126 Ill. 233, 18 N. E. 301, 1 L. R. A. 213; *Illinois, etc., R. Co. v. O'Connor*, 154 Ill. 550, 39 N. E. 563; *Illinois, etc., R. Co. v. Moore*, 160 Ill. 9, 43 N. E. 364; *Donahue v. Illinois, etc., R. Co.*, 165 Ill. 640, 46 N. E. 714; *Illinois, etc., R. Co. v. Wakefield*, 173 Ill. 564, 50 N. E. 1002; *Matthews v. Lake Shore, etc., R. Co.*, 110 Mich. 170, 67 N. W. 1111; *Bobbett v. South Eastern R. Co.*, L. R. 9 Q. B. Div. 424; *Norton v. London, etc., R. Co.*, L. R. 13 Ch. Div. 268; *Erie, etc., R. Co. v. Rousseau*, 17 Ont. App. 483.

Judgment affirmed.

 BROWN ET AL. v. FOLLETTE.

[No. 18,804. Filed October 9, 1900.]

MORTGAGES.—Trust Deeds.—Complaint.—Where in an action to have a deed declared a mortgage, and for an accounting, the complaint alleging that a bank after foreclosing a mortgage on certain lands which plaintiff formerly owned, and on which she held a second mortgage, agreed with plaintiff that if she would pay and secure its claim within a certain time it would deed her the land, and that she afterward entered into a contract with defendant to furnish the money to pay the bank and take and hold the land in his own name as security, but that defendant afterward claimed to be the absolute owner of the real estate and refused to surrender the same to defendant, is not bad for failing to allege that defendant had notice of plaintiff's contract with the bank at the time he accepted the deed and that she had performed all of the conditions of such contract, or because it was not disclosed by the complaint that plaintiff had a mortgageable interest in the land. *pp. 317-321.*

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MORTGAGES.—Trust Deeds.—Evidence.—Where real estate is transferred as the mere security for a debt, no matter by what form of conveyance, the transferee takes merely as a mortgagee, and has no other right or remedy, and parol evidence is admissible to show that a deed absolute on its face was intended to be a mortgage only. pp. 321, 322.

SAME.—Trust Deeds.—Complaint.—A complaint in an action to have a deed declared a mortgage, and for an accounting, alleging that certain real estate was conveyed to defendant to secure the payment of money advanced by him for plaintiff, and that defendant claims to be the absolute owner of the land, is not bad for failing to allege a tender of the amount due defendant, or plaintiff's ability and readiness to perform the conditions of the contract upon her part. p. 322.

SAME.—Trust Deeds.—Interest.—Usury.—Plaintiff, in order to secure an advancement made by defendant, caused certain real estate to be conveyed to him by warranty deed, absolute on its face, but intended as a mortgage as security for the payment of the advancement. *Held*, that an agreement to pay the lump sum of \$10,000 over and above the legal rate of interest for the loan was usurious and void, under §7046 Burns 1894. pp. 323, 324.

COSTS.—Mortgages.—Trust Deeds.—Where in an action to have a deed absolute on its face declared a mortgage, and for an accounting, the defendant answered, claiming to be the absolute owner of the real estate, and the issue thus tendered was decided against defendant, the costs of such issue were properly taxed against defendant. p. 324.

From the Lake Circuit Court. *Affirmed.*

J. B. Peterson, for appellants.

W. Olds and *C. F. Griffin*, for appellee.

HADLEY, J.—Suit by appellee for an accounting and to have certain deeds declared a mortgage.

The errors assigned all rest on the third paragraph of the complaint. The substantive facts alleged in this paragraph follow: The appellee, being the owner of 1,300 acres of described land in Lake county, sold and conveyed it to one Krech for \$242,000. Krech paid a part of the purchase price, assumed to pay certain mortgages placed thereon by appellee and held by the First National Bank of Crown Point, and executed his notes and mortgage back to appellee for the residue. Afterward appellee borrowed more money from the bank, and secured it by assigning to the

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bank certain of the Krech notes. Krech made default in payment to the bank and to appellee, and the bank thereupon, by John Brown, its president, and in his name, but for the use of the bank, began and prosecuted, to final judgment and decree, foreclosure proceedings for the collection of all its claims against the land. In the same action appellee filed her cross-complaint for foreclosure against Krech, and obtained a judgment and decree thereon for more than \$100,000 unpaid purchase money. Upon a certified copy of the decree the bank caused the whole of the lands to be sold by the sheriff, and John Brown, in his own name, but for the use of the bank, bought the same in for \$37,566. After the purchase the bank paid the taxes, and bought a first and unforeclosed mortgage indebtedness of one Allman, so that on the 27th day of January, 1895, the date of expiration of the year for redemption, the bank's total claim against the land amounted to \$48,000, less the amount of rents received by the bank. Prior to the expiration of the year for redemption, the bank agreed with the appellee that if she would pay \$12,000 of its claim, and secure the balance, it would extend the time of redemption for one year, or to January 27, 1896, and if the bank received a deed of conveyance from the sheriff upon the sale, at the expiration of the year, to wit, January 27, 1895, upon performance by appellee of her promise within the following year, the bank would cause the land to be conveyed to her. The bank did receive the sheriff's deed in the name of John Brown. The lands are worth \$250,000. On the——day of March, 1895, while appellee's agreement with the bank was still in force, appellee entered into a contract with the appellant Harry Spencer Brown to the effect that, as a loan to appellee, the appellant Brown, in consideration of a bonus or usurious interest of \$10,000, was to perform appellee's contract with the bank, and take and hold the title to the land in his own name, as security for the money required in discharging the bank's claim, principal and inter-

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est, and said \$10,000 bonus, appellee to have possession and rents and profits of the land. Pursuant to this contract, appellant Brown paid the bank \$12,000 in cash, and executed, to the acceptance of the bank, his notes for the residue of its claim; whereupon the bank, upon request of the appellee, caused its president, John Brown, to convey the land to appellant Harry Spencer Brown by a deed of special warranty, and at the same time, upon request of appellant, and as a part of the contract, appellee also executed to the appellant Brown her quitclaim deed to the land. After receiving the deeds, the appellant, contrary to his agreement, took possession of the land, and has collected all of the rents accruing since March, 1895, and has failed and refused to account to appellee for the same and claims that the deeds so executed to him by the bank and appellee were valid and absolute conveyances, and not a mortgage, and that he is thereby the absolute owner of the land in fee.

As against the other appellants, it is alleged as to Thakaberry that he claims some interest in the land, but, if he has any, it is subject to the rights of appellee; and as to Adelaide Brown, that she is the wife of Harry Spencer Brown, and has no interest in the land except such as may spring from her marital relation. Harry Spencer Brown has had possession of and collected the rents of the lands for three years, and such rents amount to the sum of \$2,500 per annum. Prayer for an accounting, and that the deeds from the bank and appellee to appellant Harry Spencer Brown be adjudged a mortgage for the security of the amount due the appellant Brown, and that appellee be declared the owner of said lands subject to said mortgage, etc.

The errors assigned call in question the sufficiency of the above facts to constitute a cause of action against either of the appellants. No reason is suggested by counsel why the complaint is not sufficient as against Thakaberry, but eight reasons are urged on behalf of Harry Spencer Brown and Adelaide Brown why the complaint is not good as to them:

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(1) Because it nowhere appears that Harry Spencer Brown had notice of appellee's contract with the bank at the time he accepted the deeds and paid the money for appellee; (2) because it is not averred that appellee performed all the conditions of her contract with the bank; (3) because the complaint shows that Krech was the owner of the lands, and that appellee had no mortgageable interest therein; (4) the facts pleaded tend to establish an express trust in appellant Brown, which can not be created by parole evidence, in violation of §3391 Burns 1894; (5) because of the absence of an averment that appellee relied and acted upon the promise of the bank to extend the time of redemption; (6) appellee, being one of the judgment creditors in the decree upon which the land was sold by the sheriff, had no right of redemption; (7) it was not averred that the sale to John Brown was upon the bank's foreclosure; (8) it contains no offer to pay what may be found due upon an accounting.

We do not perceive the pertinency of these objections—except the fourth and eighth—to the question before us. Neither the First National Bank of Crown Point nor any of its officers are parties to this action. No complaint is lodged against either. This complaint proceeds upon the theory that the appellant Harry Spencer Brown has violated his contract with the appellee, to her injury. It is charged therein that the appellant Brown loaned appellee \$48,000 with which to discharge certain indebtedness to the bank, upon an agreement that appellee should cause the 1,300 acres of land to be conveyed to him by deeds absolute upon their face, but which were to be accepted and held by him only as a security for the repayment of the loan. Appellant's demurrer admits these averments to be true, and further admits that, in violation of his said agreement, he now claims that said deeds were not a security, but absolute conveyances, and that he is, in virtue thereof, the absolute owner in fee of the lands. Thus situated, appellant has no right to excuse his wrong upon the ground that he had

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no previous notice of the terms of the contract by which appellee had procured from a third person the security she had promised and had given him for the loan; and quite as little right to question whether appellee had or had not kept her contract with such third person; or as to who had been the previous owner, and what appellee's previous interest in the property had been; or whether she had or had not relied and acted upon the bank's promise to extend the time for redemption; or whether appellee had or had not the right of redemption from the bank. Whatever may have been the character of the dealings between the appellee and the bank is of no concern to appellant. According to the complaint, the security he received was what he contracted for. The validity of his title is undisputed, and, if he peaceably enjoys all that he is entitled to, what difference can it make to him whence or how it came? Furthermore, if the law gave the bank the right to keep, under its sheriff's deed, the lands worth \$250,000 for its debt of \$48,000, or the right to declare appellee's contract for redemption forfeited for want of timely performance, but, being impressed with its moral duty to accept its money, and restore the valuable property to its rightful owner, the bank waived its legal rights, and made the conveyance to appellant upon request of the appellee, the generous act of the bank is to be commended, and can not be employed by the appellant as a means of despoiling appellee of her benefits. The bank, being the purchaser and holder of the certificate, was the only one to challenge the character or right of the redemptioner, and, once possessed of the title under the sheriff's deed, might even then grant redemption or make a resale—call it what we please—without enlarging the rights of disinterested strangers to the transaction.

Appellant's fourth objection to the complaint is also without foundation. The law is firmly settled in this State that wherever real estate is transferred as the mere security

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for a debt, no matter by what form of conveyance, the transferee takes merely as a mortgagee, and has no other right or remedy, and parol evidence is admissible to show that a deed absolute upon its face was intended to be a mortgage only. See authorities collected in *Turpie v. Lowe*, 114 Ind. 37, at page 47.

The cases of *Kemp v. Mitchell*, 36 Ind. 249, and *Dawson v. Overmyer*, 141 Ind. 438, relied upon by appellant in support of his eighth proposition, were actions to redeem, and, though they contain a correct statement of the law, can not be accepted as authority in this case. This is not an action to redeem, but for an accounting, and to have the *right* to redeem *declared* upon disputed written contracts. The prayer is that the appellant Brown be required to account for the rents received by him during the three years that he held the land, and that the sum be credited upon the amount due him from the appellee, and that the deeds to appellant be declared to be a mortgage only to secure said indebtedness, and that appellee be given a reasonable time to redeem, or that, upon an ascertainment of the amount due appellant, he be permitted to proceed to foreclose his mortgage as other mortgages are foreclosed.

The rule applicable in actions to redeem, that requires the plaintiff to tender the amount due, or aver his ability and readiness to perform the decree upon his part, does not apply to a case which has for its object only the construction of a contract, and the determination thereunder of the rights of the parties. Under the averments of the complaint that the appellant denies that appellee has any interest in the land, or the rents arising therefrom, and that he claims and asserts that his deeds thereto are absolute conveyances, and not a mortgage, and that he is the absolute owner in fee of the land, we think it is within the equity powers of the court to entertain the action for a statement of account between the parties, and to declare the legal effect of the disputed instruments. We hold, therefore, that the complaint is sufficient.

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As a reason for a new trial appellant Brown urges that the finding and judgment of the court is not sustained by sufficient evidence; and particularly is it insisted that there is a total failure of proof (1) that appellee had an equity of redemption in the land at the time of its conveyance to appellant Harry Spencer Brown, and (2) that John Brown and one Murphy were authorized agents and acting for the First National Bank of Crown Point when the agreement was made with appellee for her repurchase or redemption of the land. As we have before seen, the facts here questioned are wholly immaterial. The appellant Brown, as a loan of money to appellee, discharged appellee's indebtedness to the bank upon terms which she had previously contracted with the bank, and, as a security for the repayment of the loan, appellant had taken a conveyance of the land by deeds absolute upon their face, but intended only as a mortgage. This is appellee's contention. Upon this proposition she submitted her suit, and by it she must win or lose. All collateral questions between appellee and the bank or its officers, not entering into the contract between the appellant and appellee, are foreign to the controversy between these parties. The court, upon the whole evidence, found for the appellee. The evidence is confused and contradictory. We can not weigh it, but deem it proper to state that there was ample evidence in support of all the material averments of the complaint.

The court gave the appellant judgment against the appellee for the amount of principal and interest due from appellee, but disallowed the bonus of \$10,000 stipulated for. And this appellant claims was error. The court found the transaction to be a simple loan of money, and, therefore, the agreement to pay the lump sum of \$10,000, over and above the legal rate of interest, for the loan, is clearly usurious and void, under §7046 Burns 1894. There is no merit in the contention that it was the consideration promised for the *right* to redeem. This right is perfect in appel-

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lee when she repays her loan, with agreed interest, within legal limits. The principle upon which building and loan associations are permitted to collect penalties bears no analogy, and the cases cited have no application.

The court taxed to appellee all the costs accrued in the action up to the filing of the answer, and the balance to the appellant; and appellant complains that his motion to tax it all to the appellee was overruled. The motion was properly overruled. If appellant had disclaimed any interest in the land beyond holding it as security for the money he had loaned appellee, the costs would have ended with the answer, and been all rightfully taxable to the appellee. But he denied that he so held the land, and claimed to be the absolute owner, and the issue he thus tendered was tried and decided against him. That the court should require him to pay only the costs of that issue is quite as fair to him as he should ask. Numerous questions are reserved upon the admission and exclusion of evidence. The alleged erroneous character of the action of the court with respect to these questions is merely suggested by counsel, and, after considering them in detail, so far as they relate to material matters, we fail to perceive how the appellant can be injured by the rulings. We find no error in the record. Judgment affirmed.

PEOPLE'S LOAN AND SAVINGS ASSOCIATION v.
CAREY ET AL.

[No. 19,255. Filed October 11, 1900.]

MORTGAGES.—Liens.—Contracts.—The holder of a lien upon real estate surrendered the same in order that the owner might make a larger loan thereon with a building and loan association. The association entered into a written agreement that after the payment of "all mechanics' and other liens, which have been or may be hereafter filed against the property described in the mortgage, * * * and when said buildings are fully completed, and all material and labor fully paid," any sum remaining should be paid to the holder of the

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original lien. After the payment of the liens, there remained the sum of \$800.39, which the association paid to the mortgagor. *Held*, in an action by the association to foreclose its mortgage, that the original lien holder was entitled to recover on a cross-complaint the amount paid by the association to the mortgagor.

From the LaPorte Circuit Court. *Affirmed*.

W. D. Frazer and *O. Oldfather*, for appellant.

F. E. Osborn and *H. W. Sallwasser*, for appellees.

HADLEY, J.—This action was commenced by appellant to foreclose a mortgage. Appellee Carey filed a cross-complaint. The issue was formed and trial had upon the cross-complaint. We are not informed by the record as to what became of the complaint. Appellant's separate demurrer to each the second (a) and third (a) paragraphs of the cross-complaint was overruled, as was likewise its motion for a new trial, for judgment upon the special finding, and its exceptions to the conclusion of law. Error is severally assigned upon each of these rulings.

The special finding discloses the following facts: Prior to January 20, 1896, one Krotz purchased of one Wells the real estate described in the complaint, and the appellee Shadrach H. Carey furnished the purchase money therefor, and, as a security for that and other sums to be advanced for improvements, took a conveyance in his name from Wells by a deed absolute upon its face. Krotz afterwards subdivided the land into lots, and commenced the erection thereon of buildings and other improvements, the said Carey furnishing from time to time the money that was used in such improvements. On January 20, 1896, Krotz was indebted to Carey, on account of purchase money and sums advanced for said improvements, the total amount of \$3,800, and there were on said lots fourteen storerooms in course of construction but incomplete; and on said day Krotz negotiated on the whole of said lots a loan for \$4,500 of the appellant. The title to the property being in Carey, he and Krotz met at the office of the appellant, and it was

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there mutually agreed that Carey should convey the property to Krotz to enable him to mortgage it to the appellant to secure said loan of \$4,500, and from the proceeds of the loan Krotz was to pay to Carey \$2,000, and after the payment of certain debts and all mechanic and other liens against the property what remained of said loan was to be paid to Carey; and at the same time, and as a part of the agreement and transaction, the appellant executed to Carey its written contract as follows: "Whereas, Charles W. Krotz has executed his note to this association for \$4,500, together with mortgage securing the same; and whereas, we have paid to Krotz the sum of \$2,000; now, therefore, this instrument witnesseth that we agree to pay to James W. Arthur \$211.80, and to pay all mechanic and other liens which have been or may be hereafter filed against the property described in said mortgage, not, however, to exceed the sum of \$2,288.20; and when said buildings are fully completed, and all material and labor fully paid, then any part of said sum of \$2,288.20 which we have not paid upon said liens filed upon said property, and the expenses incurred by reason of said loan, we agree to pay to Shadrach H. Carey. People's Loan & Savings Association, by C. W. Burket, President. Expenses paid \$62.60."

Appellant, pursuant to said contract, paid James W. Arthur \$211.80, deducted the expenses of the loan \$62.60, paid all the mechanic and other liens filed against the mortgaged premises, amounting in all to \$1,425.21, and making a total disbursement under said contract of \$1,699.61, and leaving a balance of the loan undisbursed under the contract of \$800.39, after the completion of the buildings, and full payment for all liens, labor, and materials therefor, which balance of \$800.39 was due appellee, Carey, under the contract. The evidence shows that appellant disbursed the full amount of the \$4,500, but paid \$800.39 of the amount directly to Krotz from time to time, upon his production of evidence that he had paid the sums for labor and materials

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in the completion of the buildings, but not upon liens filed against the property.

The cross-complaint is based upon the written contract between appellant and appellee Carey, and the real question in the case is whether under the contract, appellant was authorized to pay to Krotz, or other person, any money on account of the loan, except upon liens filed against the property; appellant's contention being that under the contract the completion of the buildings must also be provided for from the fund before Carey became entitled to any part of it, while, on the other hand, Carey contends that appellant was restricted in its disbursements to liens actually filed. We perceive no ambiguity in the language used. It is: "We agree to pay to James W. Arthur \$211.80, and to pay all mechanic and other liens which have been or may be hereafter filed against the property described in said mortgage, not, however, to exceed the sum of \$2,288.20; and when said buildings are fully completed, and all material and labor fully paid, then any part of said sum of \$2,288.20 which we have not paid upon said liens *filed* upon said property, and the expenses incurred by reason of said loan, we agree to pay to Shadrach H. Carey." A purpose to make very clear the class of debts to be paid by appellant is shown by a repetition of the words "any part of said sum of \$2,288.20 which we have not paid upon said liens *filed* upon said property * * * shall be paid to Carey."

The appellee had surrendered his first lien upon the property to enable appellant to make the loan of a larger sum to Krotz. After payment of the \$2,000, \$1,800 of Carey's claim remained unpaid, and, by conveyance of the lots to Krotz, became unsecured, except by appellant's written agreement. In this agreement it was stipulated, in effect, that no part of the loan left with appellant should go into the hands of Krotz. What reason there was for such a stipulation is not material. It might have been a matter of convenience, or the improvidence of Krotz, or a want of con-

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fidence that Krotz would make a proper application of the money. It is sufficient that it was a part of the contract that appellant should pay a certain class of debts, and what remained of the loan it should pay to Carey. This undertaking by appellant was accepted by Carey in lieu of his first lien upon the lots and as his only security for the unpaid \$1,800. It is true that final payment to Carey should not be made until the buildings were completed, and the labor and material claims fully paid. But it was not stipulated who should complete the buildings, or where the money or credit for that purpose should come from, and the absence of such a stipulation did not warrant appellant in determining for itself the use of the loan fund for that purpose. Appellant's duty was to abide by its contract as it was written. The trial court gave appellant credit on account of the loan for all sums paid by it in discharging mechanic and other liens filed against the property, and awarded judgment to appellee, Carey, for the remainder, to wit, \$800.39. And this was right. This conclusion results in disposing of all the errors assigned except the last.

The first six reasons for a new trial are waived. The seventh, eighth, ninth, and tenth complain of the exclusion of testimony as to the value of the property after the buildings had been completed. How the value of the lots at that time could affect the terms of the written contract we can not perceive. The eleventh, twelfth, and thirteenth relate to the exclusion of testimony as to the disbursement by appellant of the loan fund to Krotz, or creditors of Krotz, other than those holding liens filed against the property. This was clearly right. The fourteenth, fifteenth, and sixteenth relate to the exclusion of testimony of the same class, and which was rightfully refused. The other reasons for a new trial are waived for failure to present them. We find no error in the record. Judgment affirmed.

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CAMERON v. PARISH ET AL.

[No. 18,825. Filed June 8, 1900. Rehearing denied Oct. 11, 1900.]

WILLS.—Husband and Wife.—Separate Property of Wife.—Election by Wife.—Where, by the terms of a will, testator gave all of his property to his wife, and provided therein that at the death of the wife "all of the property which she may then own" should be equally divided between his granddaughter and his foster son, such instrument did not present such a case as required the wife, under the equitable doctrine of election, to decide whether she would accept the benefits bestowed upon her therein, and thereby adopt the will as an entirety, and by such acceptance impliedly consent that property, owned and held by her at the time of her death under a deed of conveyance, should be subjected to the provisions of her husband's will, and at her death, as therein provided, should go in equal parts to the granddaughter and foster son.

From the Warren Circuit Court. *Reversed.*

C. V. McAdams, for appellant.

E. F. McCabe, for appellees.

JORDAN, J.—Appellee instituted this action in the lower court against appellant to quiet his title to the undivided one-half of a certain tract of real estate situated in the town of Williamsport, Warren county, Indiana. There was an answer in denial and a cross-complaint upon the part of the defendant. The latter, by her cross-complaint, alleged that she was the owner in fee of the entire premises in dispute, and she sought thereby to quiet her title as against the plaintiff, appellee in this appeal. Upon the issues joined under the pleadings there was a trial by the court, and a special finding of facts and conclusions of law thereon, to the effect that the appellee was the owner in fee of the undivided one-half of the premises described in the complaint, and was entitled to have his title quieted; and, over the exceptions of appellant to the court's conclusions of law upon the facts found, judgment was rendered accordingly.

155	329
163	309
155	329
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155	329
166	147
f166	359
f168	173

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The question presented is: Did the court err in its conclusions of law in favor of appellee upon the facts embraced in the special finding? The pertinent and material facts disclosed by the finding are substantially as follows: William Cameron, prior to the year 1889, had been a farmer, and resided upon a farm, which he owned, in Warren county. On October 1, 1889, he purchased the real estate in controversy, paying therefor the sum of \$2,100; and caused it to be conveyed in fee simple to his wife, Matilda Cameron. A short time after the purchase of said real estate, he and his wife moved onto the same, and continued to make their home thereon until the death of each. After taking up their residence upon said land, William Cameron purchased other real property in the town of Williamsport of the value of \$800, the title of which he took in his own name, and continued to own and hold the same until his death. He and his wife had one child, James Cameron, who died in the year 1887, leaving surviving him as his only child the appellant, Lena Frances Cameron; and at the time of the execution by William Cameron of the will hereinafter mentioned she and her grandmother, Matilda Cameron, were the only heirs of the said William. The appellee, George Parish, was taken by the said Cameron and his wife, Matilda, into their family when he was a mere child, and was made a member thereof, but was never in any manner legally adopted as their child; and at the death of William Cameron he was of the age of thirty-one years, and was still residing with the said William and his wife as a member of their family, and was not possessed of any property or estate of any kind whatever. On October 10, 1891, Matilda Cameron still owned the real estate in dispute, which had been conveyed to her in 1889, as heretofore stated, and continued to own the same until her death, but was not the owner, on said October 10, 1891, of any personal property save and except her wearing apparel and some household goods. On said date William Cameron was

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the owner of personal property of the probable value of \$4,500, and he also owned ten acres of real estate situated without the town of Williamsport, Warren county, Indiana, of the probable value of \$1,000, and was still the owner of the real estate heretofore mentioned as being purchased by him for the price of \$800. On the said October 10, 1891, William Cameron executed his last will and testament. By said document he directed, first, that all of his just debts and funeral expenses be paid by his executor as soon after his death as possible.

The second and third clauses of the will are as follows: (2) "I give, devise, and bequeath to my beloved wife, Matilda Cameron, all my property, real and personal, of every character and description, wherever the same may be situated, to use and dispose of as she may desire, with power to sell and convey the same, or do with the same as she may desire." (3) "At the death of my wife I will and direct that all of the property which she may then own shall be equally divided between my granddaughter, Lena Frances Cameron, and my foster-son, George Parish, share and share alike, except as herein otherwise provided to one acre of real estate."

By the fourth clause he directed that, in the event his said wife, Matilda, had not, during her life, disposed of the one acre of land owned by him and situated near the Indiana Mineral Springs—being the one acre mentioned in the third clause of the will—then, and in that event, the title thereto was to vest in his said grandchild, Lena Cameron, her mother, Sue Cameron, and the said George Parish during their lives, and at their death the title thereto was to vest in fee simple in their surviving heirs.

The fifth clause of the will provided that, in case the said Parish or the said Lena Frances Cameron died without issue of their bodies, or either of them, alive, then the property which they received from his wife at her death was to go to and vest in George Cameron, his nephew, and Thomas

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Moore, a nephew of his wife; it being provided therein that the said property in all cases should be responsible for the funeral expenses of his said wife before vesting in his said granddaughter and the said Parish, and also responsible for her debts.

On December 16th following the execution of the will, William Cameron died, leaving surviving him his wife as his widow, and his will was duly admitted to probate in the Warren Circuit Court; and C. V. McAdams, the executor therein named, duly qualified as such, and continued to administer his trust until he was regularly discharged as such executor on the 13th day of March, 1893.

The court finds that the said widow, Matilda, at no time after the death of her husband, filed any written election with any one to take her interest in her husband's property pursuant to the laws of Indiana in preference to the provisions of her husband's will, but that she elected to and did take all her husband's property under his said will. The executor, pursuant to the will, turned over to her money, household goods, and a decree of foreclosure to the amount of \$2,334.21. From this sum the executor paid out, under directions from her, the sum of \$55.19 on taxes due upon her real estate, and the further sum of \$182.71 upon a school fund mortgage existing against her real estate at the time the same was purchased and conveyed to her.

It is further found by the court in its special finding that, after the death of William Cameron, his widow, Matilda, took possession of all the real estate of which he died the owner, and that she converted all the personal property turned over by said executor into cash, and loaned and used the same as she felt disposed; that she sold one piece of real estate owned by the testator at the time of his death, situated in the town of Williamsport, for the sum of \$800, and caused a portion of the other lands, owned and held by her husband at his death, to be platted, and during her lifetime she disposed of sixteen other tracts or lots by warranty deed

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made by her as widow of the testator, and received for such conveyances the sum of \$730; and at the time of her death the real estate which she had acquired under the will of her husband remaining undisposed of by her was but the one acre of land heretofore mentioned, which was of the value of \$150.

On the 13th day of July, 1898, Matilda Cameron died intestate, and the value of all the personal property then owned by her, all of which came to her under her husband's will, was \$1,682.28, and consisted of household goods, horse and carriage, notes, and money. After her death, to wit, on July 20, 1898, appellant and appellee, out of the moneys on hand at her death, fully paid and settled all her debts and funeral expenses, which amounted to \$293, leaving a residue of her personal estate amounting to \$1,389.22, which was then and there equally divided between appellant and appellee. At the time appellant and appellee made the division of the property acquired by Matilda Cameron under her husband's will, and which remained undisposed of at her death, as heretofore stated, they each supposed that the title to the real estate in controversy in this action was in William Cameron at the time of his death, and, thereupon, acting under this supposition in regard to the title of said real estate, they leased the same to one Johnson for a term of one year at an agreed rent of \$10 per month, one-half of which, by the terms of such lease, to be paid to each of them. And the said tenant took possession of the property, and has ever since held and is now in possession thereof pursuant to said lease.

A short time before the commencement of this suit, appellee, George Parish, discovered the fact that the title to said real estate had always been in Matilda Cameron from the time it was conveyed to her, as heretofore stated, up to the time of her death, and was never at any time owned by William Cameron; and thereupon he communicated the information to the appellant, Lena Frances Cameron, and de-

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manded of her that she execute to him a deed of conveyance for one-half of said real estate, which she refused to do, but, on the contrary, asserted, and still asserts, her entire ownership to the said realty as the only surviving heir at law of her grandmother, Matilda Cameron; and has demanded of said tenant that all the rents of said real estate be paid to her. At the time William Cameron executed his will he was sixty-nine years old, and his wife, Matilda, was sixty-eight.

Upon the foregoing facts the court stated its conclusions of law as follows: (1) That the plaintiff, George Parish, is the owner in fee simple of the undivided one-half of the property in controversy, and is entitled to have his title quieted; (2) that the defendant, Lena Frances Cameron, is the owner in fee simple of the other half of said real estate, and is entitled to have her title thereto quieted.

Appellant asserts title to the entire premises involved in this action by virtue of inheritance as the sole heir of her grandmother, Matilda Cameron, while, upon the other hand, appellee claims title to the undivided one-half thereof under the provisions of the will of William Cameron. Counsel for appellant insists that under the second clause of the will in question, when tested by the doctrine asserted in the case of *John v. Bradbury*, 97 Ind. 263, the wife of the testator acquired but a life estate in the property devised thereby to her, with the power of disposing of the same during her natural life; that by the third clause it must be held that the testator intended that all the property which he devised to his wife under the previous clause remaining undisposed of at her death should go in equal parts to appellant and appellee; that, by the provisions of said third clause, the testator merely intended to direct in respect to the disposition of the property which his wife had acquired under his will, and which in whole or in part she might still own at the date of her death; and that said clause can not be interpreted so as to include other property owned by the

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wife at the date of her death. Counsel for appellee, upon the contrary, contends that by the clause "all the property which she may then own shall be equally divided," etc., as expressed in item three, the testator intended to embrace all of the property owned by his wife, without regard as to whether the same came to her through or under his will or was otherwise acquired and owned by her. Consequently, it is asserted that under the equitable rule the will presented a case for election upon the part of the testator's surviving wife; that she, as a beneficiary under the will, was by its provisions clearly required to decide whether or not she would accept the benefits or bounty conferred upon her by the will, or renounce the same *in toto*; that, having elected to accept or take the property which the testator donated to her, she must thereby be deemed to have adopted the will as an entirety, and consented that any and all property that she owned at the date of her death should be subjected to its provisions, and disposed of as therein directed.

That the second clause of William Cameron's will, standing alone, must be held, under the well settled principles of law so universally asserted and affirmed by our own decisions and other authorities in general, to have invested his wife with an absolute title to the property thereby devised to her, can not be successfully controverted. *Ross v. Ross*, 135 Ind. 367; *Rogers v. Winklespleck*, 143 Ind. 373; *Mulvane v. Rude*, 146 Ind. 476, and authorities there cited; *Rusk v. Zuck*, 147 Ind. 388; *Van Gorder v. Smith*, 99 Ind. 404.

In order to construe the will in controversy as creating a life estate only in the testator's surviving wife, with power of disposition over the property bequeathed to her, we would be required to extend the rule farther than it was carried by the decision in the case of *John v. Bradbury*, 97 Ind. 263. In *Goudie v. Johnston*, 109 Ind. 427, it was said that the former case possibly carried the doctrine too far. Certainly, however, it may be asserted that the

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rule, as recognized and applied in *John v. Bradbury, supra*, is incompatible with the doctrine announced in the later cases of this court, especially in that of *Mulvane v. Rude*, 146 Ind. 476; and the John case must at least be considered as impliedly overruled by these later decisions. As the second clause of the will in effect gave to the testator's wife an absolute title in fee, consequently nothing remained of the estate from which a remainder over could be limited, as it is a well settled proposition that a remainder over can not be engrafted upon or carved out of a precedent absolute estate in fee. Therefore, so far as the testator may have attempted by the third clause of his will to limit the disposition of the property donated to his wife, and not disposed of by her during her life, such attempt under that clause must be held to be inoperative, and of no effect for that purpose. For the rule is well settled that where an estate, as under the will in this case, is generally and indefinitely given to a person with full power of disposition, in the absence in the will of an express mention to show that the estate given is limited to the life of the donee, it must be held that such devise of property carries with it a fee simple to the same, and any limitation over is inoperative or void by reason of its being repugnant to the principal devise. *Mulvane v. Rude, supra*, and authorities there cited.

The principal point, however, involved in this appeal does not depend upon the question as to whether Mrs. Cameron took a life estate or one in fee simple in the property bequeathed to her by her husband's will, but the real question presented is: Did that instrument, under its terms and provisions, present such a case as required her, under the equitable doctrine of election, to decide whether she would accept the benefits bestowed upon her therein, and thereby adopt the will as an entirety, and by such acceptance impliedly consent that the property in controversy, owned and held by her at the date of her death under a deed of conveyance, should be subjected to the provisions of her

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husband's will, and, at her death, as therein provided, should go in equal parts to appellant and appellee? The doctrine of election, so far as it relates to wills and other instruments of donation, arises out of the equitable principle that a person shall not be permitted to accept under such instruments without giving all the provisions thereof full force and effect so far as such person is concerned. The doctrine of election, as between inconsistent rights and its application to wills, has long been established and is firmly settled by the authorities.

Story in his Equity Jurisprudence, §1077, in treating upon the subject, says: "In short, courts of equity, in such cases, adopt the rational exposition of the will, that there is an implied condition that he who accepts a benefit under the instrument shall adopt the whole, conforming to all its provisions and renouncing every right inconsistent with it."

The equitable doctrine is to the effect that a person can not be permitted to hold under a will and also to hold against its provisions; or, in other words, having once accepted beneficial interests under a will, he will be held to have confirmed and ratified every part thereof, and will not thereafter be permitted to interpose any right or claim of his own, however well founded it may be, which would defeat or in any manner prevent the full operation of such will. Where a person, under the terms of a will, has been thereby properly put to his election, and can be said to have elected to accept the benefits bestowed upon him by its provisions, he thereby binds or precludes, not only himself, but also those who claim through him, his representatives and heirs. *Wilson v. Wilson*, 145 Ind. 659. Of course, under the will in question, Matilda Cameron, as the widow of the testator, was, under §2666 Burns 1894, required to elect within the time therein fixed as to whether she would renounce the provisions made for her by her husband's will, and elect to be governed by the statute of descent in respect

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to her rights in her husband's estate. As it does not appear that she, within the time stipulated by the statute, expressly rejected, in the manner therein provided, the provisions made for her by the will, her failure to do so must be considered the equivalent of an express election upon her part to abide by and accept the provisions of the will, and be controlled thereby in respect to her rights in her husband's estate.

It is settled that whenever it is reasonably clear that the provisions of a will are intended to be in lieu of the widow's interest in her husband's estate, under the law, if she accepts the former, she thereby waives the latter. *Burden v. Burden*, 141 Ind. 471; *Hurley v. McIver*, 119 Ind. 53; *Archibald v. Long, Ex.*, 144 Ind. 451. But, under the will in this case can it be held that Mrs. Cameron, by her election to adopt and abide by the provisions made for her therein, did anything more than to waive her rights and claims in and to her husband's estate, which she had and held under the law as his widow? Can it, in reason, be further said that by this election she bound herself to permit the real estate in dispute to pass under the operation of her husband's will, and go to the parties in this action, as therein provided? We are of the opinion that this latter question must be answered in the negative. We are bound to assume, until the contrary clearly appears, that the testator, by his will, only intended to dispose of property subject under the law to his disposition, and, in order to create a proper case for election, under the equitable rule in question, his intention to dispose of property not his own must be made clearly to appear beyond a reasonable doubt from the will itself. It must be disclosed by such instrument that he therein assumed the power to dispose of the property of another person, who thereunder was also made a beneficiary. This feature of the doctrine of election, as settled by the authorities, is well stated by an eminent author as follows: "In order to create the necessity for an election,

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there must appear upon the face of the will itself, or of the other instrument of donation, a clear, unmistakable intention, on the part of the testator or other donor, to dispose of property which is in fact not his own. This intention to dispose of property which in fact belongs to another, and is not within the donor's power of disposition, must appear from language of the instrument which is unequivocal, which leaves no doubt as to the donor's design; the necessity of an election can never exist from an uncertain or dubious interpretation of the clause of donation. It is the settled rule that no case for an election arises unless the gift to one beneficiary is irreconcilable with an estate, interest, or right which another donee is called upon to relinquish; if both gifts can, upon any interpretation of which the language is reasonably susceptible, stand together, then an election is unnecessary. The instrument may declare in express terms that the gift to A must be accepted by him in lieu of his own interest, which is thereby transferred to B, and then no possible doubt could exist. But this direct mode of exhibiting the donor's purpose is not indispensable. It is sufficient if the dispositions of the instrument, fairly and reasonably interpreted, exhibit a clear intention of the donor to bestow upon B some estate, interest, or right of property, which is not the donor's, but which belongs to A, and at the same time to give to A some benefits derived from the donor's own property. It is immaterial, however, whether the donor knew the property not to be his own, or erroneously conceived it to be his own; for in either case, if the intention to dispose of it clearly appears, the necessity for an election exists." 1 Pomeroy's Eq. Jur. §472.

In *Havens v. Sackett*, 15 N. Y. 365, on page 373 of the opinion, it is said: "It must be clear beyond all reasonable doubt that he [the testator] has intentionally assumed to dispose of the property of the beneficiary, who is required, on that account, to give up his own gift."

When tested by this rule, which is so fully affirmed and

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sustained by the authorities, it is evident, we think, that the will in the case at bar does not come up to the requirement and clearly expose by its own provisions that the testator assumed the right to dispose of property owned by his wife and which she had in no manner acquired under or through his will. As previously said, the testator, under the second clause of his will, gave his wife an absolute and unconditional title in fee to all of his property, with the power to sell and do with the same as she might desire. It appears by the provisions of the third clause of his will that he supposed he had the power to control the disposition of the property which his wife held under and through the will undisposed of at the time of her death. That the testator, by the third item of his will, had in mind the disposition of the property only which he had devised to his wife under the previous clause is made more manifest by the exception in the latter of the one acre owned by him, and which in the fourth clause he states is situated near the Indiana Mineral Springs, and as to which, under this latter clause, he directs, in the event his wife shall not during her lifetime have disposed of this particular tract, that the title thereto at her death shall vest in the parties to this action, together with the mother of appellant, during their natural lives. This one acre tract, as the testator seems to have understood, had been devised by him under clause two of his will, along with his other property, to his wife; but as to it he appears to have desired that, if it was not disposed of by her during her life, it should go, not alone to the appellant and appellee, but that the mother of the former should have an interest therein. When this exception in clause three of the will is considered in connection with clause four, we think it becomes manifest that the testator, under an erroneous supposition as to his power to do so, intended only to direct the disposition, at the death of his wife, of the property then held by her under his will, and that the provisions of the clause can not be interpreted to have any reference to or embrace the particular property here involved.

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Under these circumstances, the will did not present a case of election under the equitable rule to which we have referred, and the property involved in this appeal is not affected by the fact that Mrs. Cameron accepted the provisions made for her by her husband's will. It therefore follows, and we so conclude, that the premises in controversy in this action, under the facts found by the court, descended as an entirety to appellant, Lena Frances Cameron, as the sole heir at law of her grandmother, Matilda Cameron.

The court, therefore, erred in its conclusions of law in holding that appellee was entitled to the undivided one-half of said premises. The judgment is ordered to be reversed, and the cause remanded to the lower court, with instructions to restate its conclusions of law upon the facts found in favor of appellant to the effect that she is the owner of the premises described in the complaint and in the cross-complaint, and under the latter she is entitled to a judgment quieting her title against appellee to the real estate in question.

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[No. 19,169. Filed October 12, 1900.]

155	341
f165	152
165	438
155	341
f167	183

HOMICIDE.—Indictment.—Where Death was Caused in Manner Unknown to Grand Jury.—Where the evidence before the grand jury points to the commission of a murder by the accused, but from such evidence they are in doubt as to the cause of death, a count may be framed alleging that the death was caused in some manner to them unknown. pp. 342, 343.

SAME.—Indictment.—Allegation of Assault.—In an indictment for murder, it is not necessary to charge, in formal and express terms, an assault or an assault and battery. p. 344.

From the Owen Circuit Court. *Affirmed.*

J. R. East, R. H. East and E. S. Davis, for appellant.

W. L. Taylor, Attorney-General, *H. L. McGinnis, C. D. Hunt, Merrill Moores and C. C. Hadley*, for State.

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MONKS, J.—Appellant was by a jury found guilty of murder in the first degree, as charged in the second count of the indictment, and his punishment assessed at imprisonment in the State prison for life. The assignment of errors calls in question the sufficiency of the second count of the indictment. Said count, omitting surplusage, date, venue, and formal parts, charges that “William Waggoner * * * did * * * feloniously, purposely, and with premeditated malice kill and murder one Clara Waggoner * * * by means and ways unknown to this grand jury * * * and by reason of the use of said unknown means and ways the said Clara Waggoner then and there died.”

The statutes of this State provide that an indictment is sufficient if the offense charged is set forth in plain and concise language without unnecessary repetition, and with such a degree of certainty that the court may pronounce judgment, upon a conviction, according to the right of the case (Cl. 4, 5, §1824 Burns 1894, §1755 R. S. 1881 and Horner 1897); but that no indictment shall be deemed invalid or quashed for certain defects named, or “for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits.” §1825 Burns 1894, §1756 R. S. 1881 and Horner 1897.

Under these provisions, it is the duty of a grand jury in framing an indictment to state their charge with reasonable certainty. The indictment, however, is only the charge of the grand jury; and if the evidence before them points to the commission of a murder by the accused in two or more modes, but leaves it doubtful in which, it is proper to present different counts, stating the cause of death in different ways, so as to meet the facts as they may appear at the trial; and if, from the evidence before them, they are in doubt as to the cause of death, a count may be framed alleging that the death was caused in some manner to them unknown. *Commonwealth v. Webster*, 5 Cush. 295, 52 Am.

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Dec. 711; *Commonwealth v. Coy*, 157 Mass. 200, 215, 32 N. E. 4, and cases cited; *Cox v. People*, 80 N. Y. 500, 516, and cases cited; *People v. Cronin*, 34 Cal. 191, 200, 210; *Edmonds v. State*, 34 Ark. 720.

As was said in Bishop's New Crim. Proc. §§495, 553: "Undoubtedly a grand jury should not indict a man unless reasonably informed of his guilt. But the jurors may know it sufficiently, while ignorant of an identifying circumstance, such as ordinarily ought to appear in allegation. Then they may state the main facts, adding that this circumstance is unknown to them, and the indictment will be good. Thus if they are ignorant of an identifying name, the allegation may be in this form. And other circumstances of the offense, if unknown to the grand jury, may be dealt with in the same way; that is, the indictment, instead of saying what they are, may state that they are to them unknown. In homicide the indictment may charge that it was committed 'in some way and manner, and by some means, instruments, and weapons to the jurors unknown' if in fact the grand jury are unable on investigation to be more specific."

Said second count is in the usual form of indictments for murder in the first degree in this State, except that the means used in taking the life of the deceased are not stated. *Lane v. State*, 151 Ind. 511; *Dennis v. State*, 103 Ind. 142, 144, 145, and cases cited.

In *Commonwealth v. Webster*, 5 Cush. 295, 52 Am. Dec. 712, a count of the indictment charged that "Webster * * * in and upon the said George Parkham, feloniously, wilfully, and of his malice aforethought, did make an assault; and him, the said George Parkman, in some way and manner, and by some means, instruments, and weapons to the jurors unknown, did then and there feloniously, wilfully, and of malice aforethought, deprive of life, so that," etc. The same was held sufficient.

In *Edmonds v. State*, 34 Ark. 720, 722, the second count

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charged that "Thomas Edmonds * * * wilfully, deliberately, feloniously of his own malice aforethought, and with premeditation, did kill and murder a certain woman, whose Christian name was Julia, but whose surname is to the jurors unknown, then and there being, in some way and manner, and by some means, instruments and weapons to the jurors unknown," etc. It was held that the same was good.

It is true that said second count in this case does not use the words "make an assault", as in the count held good in the Webster case, but it has been uniformly held in this State that it is not necessary in an indictment for murder to charge, in formal and express terms, an assault or an assault and battery. *Dennis v. State*, 103 Ind. 142, 145, and cases cited. In all essential features the second count in this case is substantially the same as that in the Webster case and in the first count in the Edmonds case, which were held sufficient.

It is insisted that the indictment does not charge appellant with using said "unknown means and ways", or that he was in any way connected with her death. The indictment, in plain and direct terms, charges that appellant "did kill and murder Clara Waggoner by means and ways unknown, and that, by reason of the use of said unknown means and ways, said Clara Waggoner then and there died." If appellant, feloniously, purposely, and with premeditated malice, killed and murdered the deceased by said unknown means, as charged, he certainly used said means to kill her.

Appellant cites *Shepherd v. State*, 54 Ind. 25, but in that case the pleader attempted to allege the way the deceased was killed, but failed to do so. The sufficiency of such an indictment is governed by rules not applicable in this case; and that case is therefore not in point here. *Littell v. State*, 133 Ind. 577 is also cited by appellant, but the part of that case relied upon was disapproved in *Green v. State*, 154 Ind. 655. It follows that there is no defect or imperfection

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in said second count which tends to prejudice the substantial rights of appellant upon the merits of the case. §1825 Burns 1894, §1756 R. S. 1881 and Horner 1897. The court did not err, therefore, in overruling the motion to quash. Judgment affirmed.

CITY OF RICHMOND ET AL. v. DICKINSON.

[No. 18,827. Filed October 28, 1900.]

MUNICIPAL CORPORATIONS.—*Taxation.*—*Search for Omitted Property.*—*Contracts.*—The duty of searching for secreted property is not imposed upon the tax officers of a city, therefore a city may, under the general power to levy and collect taxes upon all property subject to taxation, contract with a private person to search for property secreted and omitted from the tax duplicate.

From the Wayne Circuit Court. *Reversed.*

Conner & Conner, for appellants.

L. D. Stubbs and *T. J. Study*, for appellee.

BAKER, C. J.—On appellee's suit a decree was entered enjoining the city and its officers from carrying out a contract with appellant Clifford. The assignment is that the court erred in overruling appellant's demurrer to the complaint.

The complaint shows that the appellee is a citizen and taxpayer of the city of Richmond; that the city entered into a contract with Clifford whereby Clifford undertook to search for property that had been secreted and omitted from the tax duplicate of the city and to report discoveries thereof to the city clerk, and whereby the city undertook to pay Clifford for his services a sum equal to twenty per centum of the taxes collected by reason of his discoveries; that Clifford has discovered a large amount of secreted and omitted property subject to taxation by the city, and has reported his discoveries to the city clerk; that the city clerk has entered such property on the tax

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duplicate; that the city treasurer has collected the taxes thereon; and that the city, unless restrained, will pay Clifford according to the contract, to the irreparable injury of appellee and all other taxpayers of the city.

Is the contract void? It is, if the services to be performed by Clifford lay within the official duties of the tax officers of the city. *City of Ft. Wayne v. Lehr*, 88 Ind. 62; *Miller v. Embree*, 88 Ind. 133. The tax officers of the city are the city clerk and the city treasurer. The duties of the city clerk, in reference to the original making up of the duplicate and putting omitted property thereon, are the same as the county auditor's. The duties of the city treasurer correspond with those of the county treasurer. There is no city assessor nor city board of equalization; but the city clerk is given access to the returns of the county assessor and to the duplicates in the county auditor's office; and all the provisions of the general tax law, so far as they can be applied, are to govern cities. §§3505, 8560-8565, 8672 Burns 1894, §§3070, 6409-6414, 6521 Horner 1897.

In reference to the assessment of omitted property, the present law (Acts 1897 p. 141, §8560 Burns Supp., §6409 Horner 1897) is this: "Whenever the county auditor [city clerk] shall discover or receive credible information, or if he shall have reason to believe that any real or personal property has, from any cause, been omitted in whole or in part, in the assessment of any year or number of years, from the assessment book or from the tax duplicate, he shall proceed to correct the tax duplicate and add such property thereto with the proper valuation, and charge such property and the owner thereof with the proper amount of taxes thereon; to enable him to do which he is invested with all the powers of assessors under this act. But before making such correction or addition, if the person claiming to own such property, or occupying it, or in possession thereof, resides in the county, and is not present, he shall give such person notice in writing of his intention to add such prop-

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erty to the tax duplicate, describing it in general terms, and requiring such person to appear before him at his office at a specified time, within five days after giving such notice, and to show cause, if any, why such property should not be added to the tax duplicate; and if the party so notified does not appear, or if he appears and fails to show any good and sufficient cause why such assessment shall not be made, the same shall be made, and the county auditor [city clerk] shall, in all cases, file in his office a statement of the facts or evidence on which he made such correction; but he shall in no case reduce the amount returned by the assessor, without the written consent of the Auditor of State, given on the statement of facts submitted by the county auditor. When the county auditor [city clerk] shall discover credible information or have reason to believe that real or personal property has, from any cause been omitted, in whole or in part, from assessment for taxation, or such credible information shall be furnished to such county auditor [city clerk] it shall be the duty of such county auditor [city clerk] to take the steps provided for by this section, to place such omitted property on the tax duplicate. If such county auditor [city clerk] shall fail or refuse, on the discovery by himself, or on credible information being furnished him by another person, that property has been omitted from taxation, the State on the relation of any State officer, or of the State Board of Tax Commissioners, or of any taxpayer of the county [city] in which failure or refusal occurs, shall have the right to proceed against such county auditor [city clerk] in any court of competent jurisdiction by mandamus, to compel such county auditor [city clerk] to comply with the provisions of this section. In the trial of such a suit, the question of what constitutes credible information, as mentioned in this act, shall be a question of fact to be determined by the court or jury trying the case, and either party shall have the right to demand a jury to try such question of fact. If judgment shall be ren-

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dered to the effect that credible information has been discovered by, or furnished to such county auditor [city clerk], or that he has reason to believe that property has been omitted from taxation, it shall then be the duty of such county auditor [city clerk] to forthwith place such omitted property on the tax duplicate in accordance with the provisions of this act, and such county auditor [city clerk] shall be liable for all costs of such mandamus suit and for a reasonable attorney's fee for the relator's attorney which shall be taxed as a part of the costs of such suit in all cases, where judgment is rendered against him: *Provided, however,* That in case proceedings are instituted hereunder on the relation of any private citizen, such relator shall give bond to the satisfaction of the court to pay all costs which may be recovered against them."

Tax officers are liable to fine and imprisonment for intentional failure to perform the duties required of them by law. §8560a Burns Supp., §6409a Horner 1897; §8675 Burns 1894, §6521c Horner 1897. So it is important not to confuse a privilege or right on the one hand with a duty required by law on the other. Under the statute, there is no doubt of the right of the county auditor (city clerk) to procure "credible information", as best he can, concerning secreted and omitted property. But does the law lay upon him the duty to hunt for omitted property? Must he assume that the returns of the taxpayers are false? Not merely the returns for the current year, but for an indefinite period prior to his incumbency? If he intentionally fails or refuses to act upon such an assumption, must he pay a fine and go to jail? If he must act on such an assumption to save himself, then he is bound, at his peril, to investigate the correctness of the returns of every taxpayer within his jurisdiction for every year the taxpayer might be liable to taxation on omitted property. But such is not the duty required by statute. The county auditor (city clerk) must give the notice, afford the hearing, and add the omitted

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property to the tax duplicate *whenever he shall discover or receive credible information or have reason to believe* that property has escaped taxation for any year or any number of years. This duty he may be compelled to perform. For intentional failure or refusal to discharge this duty, he may be punished. To carry out this duty, the county commissioners (city council) have no power to employ a substitute or helper.

But has the county or city no right to pay for credible information that will add to the public revenues and equalize the burdens of the taxpayers? The informant performs no official act or duty. The taxpayer who is charged with the secretion or omission of taxables is protected by an official bond, for the county auditor (city clerk) alone has the authority to make the entries on the tax duplicate. The county or city is dependent upon its receipts from taxation. And public policy demands that every taxpayer contribute his just proportion of the expenses of government.

The general powers of counties are not directly involved in this case and are therefore not considered; but, regarding cities, the statutes provide that common councils "shall have the management and control of the finances" and "shall have power to levy, and cause to be assessed and collected in each year an *ad valorem* tax of not more than one per cent. for general purposes on all property subject to State and county taxation" within their respective cities. §§3106 and 3156 R. S. 1881 and Horner 1897, §§3541 and 3617 Burns 1894. This general power of common councils is to levy and cause to be assessed and collected a tax, not merely upon the property that is returned by the assessing officers for taxation, but upon *all* property that is *subject* to taxation. This general power is worthless, unless it carries with it the right to use means efficient for its enforcement.

The section of the statute in relation to the taxation of omitted property (hereinabove quoted) is a part of the

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general tax law of 1891, as amended in 1897. The history of that section is effective proof of the fact that the legislature recognized that the search for secreted taxables was not imposed upon the tax officers and that the county (city) was so interested in collecting a full revenue and in laying equal burdens upon its taxpayers that it had a lawful right to employ persons to search for omitted property. In §147 of the general tax law of 1881 (Acts 1881 p. 661, §6416 R. S. 1881) was embodied the feature of having the county auditor (city clerk) give notice to the suspected owner and, after a hearing, put the omitted property upon the tax duplicate. This section, except as to the length of notice, was reënacted in 1891, with the significant omission of the last sentence, namely: "No person other than the officials provided for in this law shall be employed by the county commissioners [common council] *to discover omitted property.*" The amendment of 1897 consisted of adding the provisions for compelling the auditor (clerk) by mandate to perform the duties required of him by this section. It is observable that he may be compelled, not to hunt for the information, but, after receiving it, to proceed to put the omitted property, if any is found, upon the tax duplicate. In 1881 it would not have been lawful for the county commissioners (common council) to pay a tax officer for discoveries of omitted property, if the search was "a burden of the office". If it was lawful in 1881 to employ a tax officer, it became lawful in 1891 to employ anybody; but, whether or not public policy should be held to forbid the employment of public officers to do extraneous work that might influence or prejudice them in the discharge of their official duties, is a question not necessary to be determined here.

This construction of the statute is not in accord with that given in *Vandercook v. Williams, Treas.*, 106 Ind. 345. But the error was there committed of assuming that the section commanded the auditor to search for taxables secreted and omitted in any year or number of years.

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Councilmen are officers in our local self-governments. They are not required to institute a search for secreted taxables. But, if in their judgment the occasion demands it, they have the power. If these public servants do not exercise the power in accordance with the judgment of their employers, the remedy is to change servants.

Judgment reversed with instructions to sustain the demurrer to the complaint.

OSBORNE ET AL. v. ESLINGER.

[No. 18,849. Filed October 23, 1900.]

155	351
155	500
155	351
161	63
161	67
162	158

DEEDS.—Delivery.—A grantor executed certain deeds and placed them in an envelope with her name and the words “Deeds to children” indorsed thereon. She kept them in her possession for about two years, and then handed a package containing the deeds to an aged relative who lived with her, and instructed her to take care of the papers until after her death, and then to deliver them to the one who was to settle her estate. She afterward took possession of the package and placed it in a press in her house, saying to the relative, “In case I get sick you take care of these papers, and when I die give them to the one who settles my estate.” Soon afterward she became sick and called the relative to her bedside and asked her if she had taken charge of the papers, and being informed that she had, said “All right.” The custodian of the package did not know what it contained, but after the death of the grantor delivered the deeds to the grantees therein named. *Held*, that there was no delivery. pp. 352-364.

PARTITION.—Attorney's Fees.—Where defendants in a partition proceeding appeared by counsel and resisted the petition, it was error to tax them with fees of the attorneys of their adversary. p. 364.

From the Sullivan Circuit Court. *Affirmed*.

J. T. Hays and *J. S. Bays*, for appellants.

J. C. Briggs and *J. W. Lindley*, for appellee.

DOWLING, J.—Action for the partition of lands. Issues were formed; there was a trial by the court, a special finding of facts on which the court stated its conclusions of law, and judgment for appellee.

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The following is the substance of the special finding: Martha J. Osborne, a widow, was the owner in fee simple of the lands described in the complaint, and resided thereon at the time of her death, which took place April 23, 1897; she left surviving her the appellants, who were her children, and the appellee, who was her grandchild, and the only heir of a deceased daughter of Mrs. Osborne; the latter executed a will April 3, 1894, which was duly admitted to probate, by which she divided her personal estate equally among her surviving children, the appellants herein, one William L. Dix being nominated as executor.

March 6, 1893, the said Martha J. Osborne, by deed, conveyed a part of her real estate to her sons Hardy Osborne and James A. Osborne, two of the appellants, and on May 16, 1895, she caused to be prepared, and then signed and acknowledged three other deeds, viz., a deed to George W. Osborne and Josephine Dix, a deed to Elizabeth Riggs and Matilda Drake, and a deed to Stephen Parks Osborne and Allen T. Osborne. Said three deeds purported to convey all the lands owned by Mrs. Osborne, excepting those described in the deed previously made to Hardy and James A. Osborne. Mrs. Osborne placed the four deeds in an envelope, indorsed, "Martha J. Osborne. Deeds to children", sealed it, took them home with her, and kept the deeds in her possession until the spring of 1897.

After the execution of her will, she placed it in an envelope, which was then sealed, and indorsed "Last will of Martha J. Osborne," and the will so remained until after the death of the said testatrix.

In the spring of 1897, Mrs. Osborne handed the deeds and the will, wrapped together in a paper, to one Mary Davis, an aged sister-in-law, who made her home with her, saying that she desired Mrs. Davis "to take care of the papers, and keep them until after her, Mrs. Osborne's death, and then deliver them to the one who should settle her estate." Upon reflection, and because of the advanced

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age of Mrs. Davis, who was then seventy-two years old, Mrs. Osborne took back the papers, and put them in a "press" in her home, and told Mrs. Davis she had placed them there, adding, "In case I get sick, you take care of these papers, and when I die give them to the one who settles my estate." Mrs. Osborne was then in good health, but soon afterwards became very ill. Agreeably to her instructions, Mrs. Davis took the papers from Mrs. Osborne's "press", and deposited them in a box of her own, over which she had exclusive control, and so kept them until after the death of Mrs. Osborne. The next day after Mrs. Osborne was taken sick she called Mrs. Davis to her bedside, and asked if she had taken charge of the papers as she, Mrs. Osborne, had requested. Mrs. Davis answered, "Yes, I have." Mrs. Osborne responded, "All right." Mrs. Osborne died April 23, 1897.

Soon after the death of Mrs. Osborne, Mrs. Davis met all of the appellants, and also William L. Dix (who had been named as executor of Mrs. Osborne's will), at the late residence of the decedent. She handed the envelope containing the deeds to Allen T. Osborne, who read them, and delivered them to the grantees, respectively. The grantees caused the deeds to be recorded in the proper office, and thereupon took and ever since have held possession of the several parcels of land. The will of Mrs. Osborne, also, was delivered by Mrs. Davis to Allen T. Osborne at the time the deeds were delivered. It was opened, read, and was afterwards admitted to probate in the proper county, and is yet in full force. Mrs. Mary Davis had no knowledge that the package entrusted to her by Mrs. Osborne contained said deeds and will until after the death of Mrs. Osborne, but she did know that Mrs. Osborne had selected William L. Dix to settle her estate.

The conclusions of law stated by the court upon the foregoing facts were these: "(1) That the said deeds made by Martha J. Osborne to the several cross-complainants herein

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were not fully and lawfully executed, for want of a lawful delivery. (2) That the plaintiff is the owner in fee simple, by descent from Martha J. Osborne, of an undivided one-ninth interest in the following real estate, in Sullivan county, Indiana, to wit: The southeast quarter of section seven, township eight north, range nine west, 160 acres more or less. (3) That the plaintiff is entitled to partition of her interest in said land."

It is contended on behalf of appellants that the acts and words of Mrs. Osborne, when she placed the deeds in her "press", and instructed Mrs. Davis that in case she, Mrs. Osborne, got sick, to take care of the papers, and when she died to give them to the one who settled her estate, together with the act and declaration of Mrs. Davis after Mrs. Osborne became ill in taking possession of the papers, with the knowledge and approval of Mrs. Osborne, constituted a sufficient delivery. On the other hand, the appellee insists that there was no delivery, that Mrs. Osborne never intended to part with her control over the deeds, and that Mrs. Davis held them only as the bailee and for the use of Mrs. Osborne.

This court has frequently been called upon to decide whether or not a deed had been delivered, and a few of the cases, with the circumstances attending the supposed delivery in each of them, are the following.

In *Fewell v. Kessler*, 30 Ind. 195, the parties to a deed caused it to be prepared, and agreed that it should be signed and acknowledged, and left with a justice of the peace for the grantee. In deciding the case, Frazer, J., said: "Nothing is plainer in the law than that such facts constitute a good delivery of a deed."

One Loveless placed a deed in the hands of one Rash, to be held by him during the grantor's lifetime, for certain of Loveless' children, and, at his death, to be delivered by Rash to the grantees named therein. Rash accepted the deed and held it for the grantees until shortly after the

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death of the grantor, when he delivered the same to the grantees. The court said: "These facts show that William Loveless verbally authorized Rash, as his agent, to do the things mentioned. Upon the death of Loveless the authority was thereby revoked, and Rash ceased at once to be the decedent's agent for any purpose, and therefore could not, for the deceased grantor, deliver the deed." *Jones v Loveless*, 99 Ind. 317, 325.

In *Owen v. Williams*, 114 Ind. 179, the grantor was about to undergo a dangerous surgical operation. He gave to one of his sons a large bundle of papers, among which were deeds to his children inclosed in a sealed envelope, saying, "Here are the deeds belonging to you children; take care of them, and after my death deliver them to the children." He afterwards said to the son who had the papers: "I want you to see that the children get the deeds, after my death." *Held*, a sufficient delivery to all of the grantees.

Smiley and wife executed five deeds by which they conveyed certain lands to the husband's children and grandchildren. Two years afterwards Smiley made a will in which he referred to these deeds, and directed his executor, at his death, to deliver them to the grantees. A few days after the execution of the will Smiley placed the deeds in the hands of a son, and directed him to retain them until he, the grantor, should die, and then to deliver them to the grantees, respectively. *Held*, a good delivery as to all. *Smiley v. Smiley*, 114 Ind. 258.

In *Goodpaster v. Leathers*, 123 Ind. 121, the deed was duly signed and acknowledged by the grantor in his lifetime, and was by him deposited in the hands of a third person, with instructions to deliver to his widow after his death. Upon these facts, the court by Mitchell, C. J., said: "Where a grantor signs and acknowledges a deed, and deposits it with a third person, to be delivered by him to the grantee at the death of the grantor, without reserving to himself any right to control or record the instrument, if the

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deed is afterwards delivered to the grantee the title passes, and the deed ordinarily takes effect by relation, as of the date of the first delivery."

In *Dinwiddie v. Smith*, 141 Ind. 318, the deed was delivered by the grantor to a third person for the use of the grantee. The deed was sustained.

S., together with his wife, signed and acknowledged a deed conveying to his daughter, Mary R., certain real estate. He handed the deed to his wife, saying, "Take it, and keep it in a safe place until my death, then deliver it to B. F. Wells." Indorsed on the deed were the words, "After my death, this deed to be delivered by B. F. Wells." The wife kept the deed as directed, and, at the death of the grantor, delivered the same to Wells, who caused it to be recorded, and then delivered it to the grantee. The court held that the deed was not invalid as an attempt by the grantor to make a testamentary disposition of the land without the formalities of a will, and that the delivery to the wife for the grantee was effectual. *Stout v. Rayl*, 146 Ind. 379.

In *Stokes v. Anderson*, 118 Ind. 533, 4 L. R. A. 313, the facts were these. S. signed a deed, bill of sale, and promissory note, and left them upon the table. He neither said nor did anything to indicate an intention to deliver them; on the contrary, the circumstances indicated that he did not wish to execute the writings at that time. He reserved the right to examine them on the next day, and it was agreed that, if they were found to be incorrect, correction should be made. While the papers were so lying upon the table, one of the persons named in them took them up and gave them to his clerk with instructions to put them in his vault. *Held*, that there was no delivery.

It was said by Chancellor Kent, in *Souverybye v. Arden*, 1 Johns. Ch. 240, 255: "It is not to be understood that mere formal words of delivery will, in all cases, bind the party, and render the deed absolute. If it be declared, or

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agreed, at the time of execution, that the deed is not to pass out of the possession of the grantor, until certain conditions are complied with, the deed will not operate until certain conditions are fulfilled. This has been so ruled at law, in the cases of *Jackson v. Dunlap*, and of the *Derby Canal Co. v. Wilmot* (1 Johns. Cas. 114, 9 East. 360); and there is much good sense and equity in the decision. But if there be no such agreement or intention made known at the time, and both parties are present, and the usual formalities of execution take place, and the contract is to all appearance consummated, and the deed is left in the power of the grantee, or in the custody of his particular friend, without special instructions, there is no case to be found in law or equity, in which such a delivery is not held binding.

“A voluntary settlement, fairly made, is always binding in equity upon the grantor, unless there be clear and decisive proof that he never parted, nor intended to part, with the possession of the deed; and even if he retains it, the weight of authority is decidedly in favor of its validity, unless there be other circumstances, beside the mere fact of his retaining it, to show it was not intended to be absolute.”

Garnons v. Knight, 5 Barn. & Cress. 671, 687, 688, a leading English case upon the subject of what is necessary to constitute a valid delivery of a deed turned upon these facts. In July, 1814, Mr. Wynne, an attorney, who was seized in fee of the premises in question, made a communication through a friend to the lessor of the plaintiff, who was a client, that he (Wynne) had misapplied above £10,000 of his (Garnons') money. Garnons answered, he relied and expected that Wynne would provide him securities for his money, and Wynne said he would make him perfectly secure, and he should be no loser. On the 12th of April, 1820, Wynne went to his sister's who, with her niece, lived next door to him, and produced the mortgage in question, ready sealed. He then signed it in the presence of the niece and used the words, “I deliver this as my act and

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deed." The niece, by his desire, attested the execution, and then Mr. Wynne took it away. The niece knew not what the deed was, nor was Mr. Garnon's name mentioned. In the same month of April, he delivered a brown paper parcel to his sister, saying, "Here, Bess, keep this; it belongs to Mr. Garnons." He came for it again in a few days, and she gave it to him; and he returned it on the 14th, 15th, or 16th of April, saying, "Here, put this by." It was then less in bulk than before, and contained the mortgage in question. Mr. Wynne died the 10th of August following, and, after his death, the parcel was opened, and the mortgage found. Mr. Garnons knew nothing of the mortgage until after it was so found. One of the questions in the case was whether the mortgage was duly executed, and whether the delivery to the sister was a good delivery.

In deciding the case, Bayley, J., said: "Can there be any question but that delivery to a third person, for the use of the party in whose favor a deed is made, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery? The law will presume, if nothing appear to the contrary, that a man will accept what is for his benefit [*per* Lord Ellenborough in *Stirling v. Vaughan*, 11 East. 619, 11 Rev. Rep. 280], and there is the strongest ground here for presuming Mr. Garnons' assent, because of his declaration that he relied and expected Mr. Wynne would provide him security for his money, and Wynne had given an answer importing that he would. Shepherd, who is particularly strict in requiring that the deed should pass from the possession of the grantor (and more strict than the cases I have stated imply to be necessary), lays it down that delivery to the grantee will be sufficient, or delivery to any one he has authorized to receive it, or delivery to a stranger for his use and on his behalf. Shep. Touch. 57; 2 Rolle Abr. (K) 24, pl. 7; *Taw v. Bury*, Dyer, 167b, 1 And. 4; *Alford v. Lea*, 2 Leon 110, 1 Cro. Eliz. 54; and 3 Coke 27a, are clear authorities that,

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on a delivery to a stranger for the use and on the behalf of the grantee, the deed will operate *instantly*, and its operation will not be postponed till it is delivered over to or accepted by the grantee. The passage in Rolle's Abridgment is this: 'If a man make an obligation to I., and deliver it to B., if I. get the obligation, he shall have action upon it, for it shall be intended that B. took the deed for him as his servant, 3 Hen. VI., 27.' The point is put *arguendo* by Paston, Sergt., in 3 Hen. VI., who adds, 'For a servant may do what is for his master's advantage, what is to his disadvantage, not.' "

The rule is thus stated by eminent textwriters: "Where a grantor executes a deed, and delivers it to a third person to hold until the death of the grantor, the latter parting with all dominion over it, and reserving no right to recall the deed, or alter its provisions, it seems to be settled by the weight of authority that the delivery is effectual, and the grantee, on the death of the grantor, succeeds to the title." Devlin on Deeds (2nd ed.), §280, citing *Lang v. Smith*, 37 W. Va. 725, 17 S. E. 213; *Ruggles v. Lawson*, 13 Johns. 285; *Tooley v. Dibble*, 2 Hill 641; *Gcodell v. Pierce*, 2 Hill 659; *Squires v. Summers*, 85 Ind. 252; *Bury v. Young*, 98 Cal. 446, 33 Pac. 338.

"In determining what will constitute a sufficient delivery, it is found that the intention is the controlling element. No particular formality need be observed, and the intention to deliver the deed may be manifested by acts, or by words, or by both. But one or the other must be present to make a good delivery." Tiedeman on Real Prop. (2nd ed.), §813.

"Where the deed is delivered to the grantee named, the law presumes it was done with an intent, on the part of the grantor, to make it his effectual deed; but if it is delivered to a stranger, and nothing is said at the time, no such inference is drawn from the act of delivery. * * * If delivered to the grantee himself, no words are necessary, since the law presumes in such case it is for his use. If

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delivered to a stranger, there is no such presumption; and there must, therefore, be some evidence, beyond such delivery of his intent thereby to part with his title. But no precise form of words is necessary to declare such intent. Anything that shows that the delivery is for the use of the grantee is enough." 3 Washb. on Real Prop. (5th ed.), p. 314, §582.

Where the claim of title rests upon the delivery of the deed to a third person, the deed must have been properly signed by the grantor, and delivered by him, or by his direction, unconditionally, to a third person for the use of the grantee, to be delivered by such person to the grantee, either presently, or at some future day, or upon some inevitable contingency, the grantor parting, and intending to part, with all dominion and control over it, and absolutely surrendering his possession and authority over the instrument, so that it would be the duty of the custodian or trustee for the grantee, on his behalf, and as his agent and trustee to refuse to return the deed to the grantor, for any purpose, if demand should be made upon him. And there should be evidence beyond such delivery of the intent of the grantor to part with his title, and the control of the deed, and that such delivery is for the use of the grantee.

If the deed is placed in the hands of a third person, as the agent, servant, friend, or bailee of the grantor, for safe-keeping only, and not for delivery to the grantee; if the fact that the instrument is a deed is not made known to such third person, either at the time it is handed over, or at any time before the death of the grantor; if the name of the grantee, or other description of him, is not given; and if there is no evidence beyond the mere fact of such delivery of the intent of the grantor to part with his control over the instrument and his title to the land, then such transfer of the mere possession of the instrument does not constitute a delivery, and the instrument fails for want of execution.

As shown by the special finding, Mrs. Osborne had the

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deeds prepared in May, 1895. She then signed and acknowledged them. She placed them in an envelope indorsed, "Martha J. Osborne. Deeds to children." She kept them in her own possession and under her own control until the spring of 1897. She then handed a package containing the deeds and also her will to an aged lady, a relative, who made her home with her, and instructed her to *take care* of the papers until after her death, and then to deliver them *to the one who was to settle her estate*. She afterwards took the package from her relative, Mrs. Davis, and placed it in a "press" in her home, informing Mrs. Davis of the fact that she had put them there. She added: "In case I get sick, you *take care of these papers*, and when I die give them to the one who settles up my estate." Soon afterwards Mrs. Osborne became ill, and calling Mrs. Davis to her bedside, asked her if she had taken charge of the papers. Mrs. Davis answered: "Yes, I have." Mrs. Osborne said: "All right."

It is evident that when Mrs. Osborne first placed the papers in the hands of her sister-in-law, she did not intend to surrender her right to the possession and control of them, because, immediately afterwards, she took them back into her own hands, and assumed and exercised complete dominion over them. She next put them in a "press", an article of furniture in her own house, presumably belonging to, and used by, her. After placing the package there, she requested her relative, in the event of her illness, to take care of the papers, and, when she, Mrs. O., died, to give them to the one who settled up her estate. Both the will and the deeds were wrapped in a single package, and were together in the "press." The possession and control of Mrs. Davis over the will of Mrs. Osborne were of the same nature and extent as her possession and control over the deeds. She was not informed what the papers were. She was to take care of them in case Mrs. O. became sick. If Mrs. O. died, she was to give the package to Mrs. O.'s executor or administrator.

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It would seem from the words and actions of Mrs. Osborne, that she expected to take care of the papers herself so long as she might be able to do so. She regarded them as valuable documents. To secure them against destruction, loss, or spoliation at a time when she was unable, on account of sickness to preserve and take care of them, she requested Mrs. Davis to perform that duty for her. When Mrs. Davis took charge of them how did she hold them? Certainly not as a trustee or agent for the grantees. She did not know what the package contained, nor that any one, excepting Mrs. O., had any interest in it. When she was authorized to take charge of the package, nothing was said to her by Mrs. Osborne which indicated that any other person than herself had any right to the contents of the package, or that she, Mrs. O., intended to relinquish her control over it. If Mrs. Davis held as trustee or agent for the grantees, and if there was a delivery of the deeds for their use, it would have been her duty to retain the deeds for the benefit of the grantees, even if Mrs. O. had demanded them from her. But, when her position in the family, and her relation to Mrs. O. are considered, it can not be supposed either that Mrs. O. intended, or that Mrs. Davis understood, that the latter was to detain the package from Mrs. O. if the latter demanded it, or that Mrs. O. relinquished all control over its contents. In making the delivery, both the will and the deeds were included. But can it be supposed that, if Mrs. O. had desired to alter her will, or to destroy it, Mrs. Davis would have felt authorized to keep it from her? If she could not, under her instructions, keep the will, by what word or act of Mrs. Osborne was she clothed with authority to retain the deeds? What was it that Mrs. O. requested her to take care of? It was not deeds, nor a will, but a *package*. And what was she empowered to do? Simply, to take care of it if Mrs. O. should become sick, and, in the event of the death of Mrs. O. to give it to the person who should settle her estate. But what if Mrs. O. recovered

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from her sickness? Then, surely, she would have had the right to resume the exclusive possession and control of the package. It is clear that Mrs. Davis was to take care of the papers as the agent and servant of Mrs. Osborne, and that such agency was to continue, unless revoked, during the illness of Mrs. O. She was not authorized to deliver the deeds to the grantees named in them. She was to give the package, containing both the will and the deeds, to the executor of the will, or the administrator of Mrs. O.'s estate.

It does not appear that Mrs. O. was acting under legal advice, and it seems probable that she supposed she could lawfully dispose of her personal estate by will, and divide her real estate among her children by deeds to be placed in the hands of her executor or administrator. It was doubtless her intention to reserve to herself the possession and control of the deeds so long as she lived. Until her death, they were to remain in her home, in her "press" if she was well, in the hands of her relative if she was sick, but at all times accessible to her, and held in such a situation that she could control, alter, revoke, or destroy them. If she had recovered, would it not have been the duty of Mrs. Davis to replace the papers in the "press", or to return them to the hands of Mrs. O.? Or if, during her sickness, Mrs. O. had said to her relative, "Bring me that package," was there anything in the nature of Mrs. Davis' possession, under her instructions, which would have made it improper for her to do so? We must conclude that Mrs. Osborne never surrendered, or intended to part with, the control of the deeds, and that, in contemplation of law, the possession of Mrs. Davis was that of an agent of Mrs. Osborne, and, therefore, the possession of Mrs. Osborne. But if Mrs. O. retained the possession and control, then there was no delivery, and if no delivery, then the deeds were not executed for lack of it. Had Mrs. O. requested some friend owning a safe to put her papers in it, and, after her death, to hand them over to her administrator or executor, it could not

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have been understood that she thereby placed them beyond her reach, and parted with all control over them. Yet, such a disposition of these instruments would not, in legal effect, have differed from that which actually took place in this case.

The ruling English cases and some of the American decisions hold that, in the case of deeds of settlement, manual delivery of the instrument, or the equivalent of such delivery, is not indispensable. *Clavering v. Clavering*, 2 Vern. 473, 476; *Barlow v. Heneage*, Prec. Cha. 211; *Naldred v. Gilham*, 1 P. Wms. 577; *Boughton v. Boughton*, 1 Atk. 625; *Taw v. Bury*, Dyer, 167b; *McLure v. Colclough*, 17 Ala. 89; *Newton v. Bealer*, 41 Iowa 334; *Shirley v. Ayres*, 14 Ohio 307, 45 Am. Dec. 546; *Martin v. Flaharty*, 13 Mont. 96, 19 L. R. A. 242; *Farrar v. Bridges*, 5 Humph. (Tenn.) 411, 42 Am. Dec. 439.

But, in this State, the authorities are uniform that, even in the case of a voluntary deed of settlement, delivery is essential to the validity of the deed, and that it must be made either to the grantee or to some third person for his use. It follows from what has been said that the deeds which were signed and acknowledged by Mrs. Osborne were never delivered, and that they were void for that reason. The conclusions of law in this case were correctly stated by the trial court.

The motion of the appellants to modify the judgment taxing \$40 of the appellee's attorney's fees to the appellants, so that no part of such fees be taxed against appellants, should have been sustained. Where parties appear by counsel, and contest a petition for partition, they should not be required to pay the fees of the attorneys of their adversary. *Bell v. Shaffer*, 154 Ind. 413. And to this extent the judgment should be modified. The court is directed to sustain the motion to modify the judgment as to the taxation and allowance of the fees of appellee's attorneys against the appellants, in conformity with this opinion. In all other respects the judgment is affirmed.

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155	365
160	72

THE UNION CENTRAL LIFE INSURANCE COMPANY v.
DODDS ET AL.

[No. 18,846. Filed October 24, 1900.]

DEEDS. — *Record.*—*Notice.*—*Quieting Title.*—*Pleading.*—A complaint in an action to quiet title to real estate as against one claiming title by sheriff's sale, alleging that the husband of plaintiff, having good title to the land in controversy, conveyed it to plaintiff by deed before defendant recovered judgment against the husband, is insufficient, where it was not alleged that plaintiff had her deed recorded within forty-five days, or before the levy and sale, or that defendant had notice of plaintiff's title before it purchased the property.

From the Grant Circuit Court. *Reversed.*

A. E. Steele, J. A. Kersey and Maxwell & Ramsey, for appellant.

W. H. Carroll and G. D. Dean, for appellees.

HADLEY, J.—Suit by appellee to set aside a sheriff's sale and quiet title to real estate. Demurrer to each paragraph of complaint; sustained to first and second, and overruled to third.

The material facts averred in the third paragraph of the complaint are these: Lucy C. Humphries by her will devised to appellees, Mary L. and William B. Dodds, who were then and still are husband and wife, the real estate described in the complaint. The words of the will are: "I bequeath to my mother, Mary L. Dodds, and my stepfather, William B. Dodds, all property real and personal which I shall own at my death, to have and to hold, share and share alike, absolutely and in fee simple." The will was probated and entered of record in Grant county, wherein the real estate is situate, May 1, 1895. William B. became indebted to his wife in the sum of \$6,000 for money loaned, and January 24, 1896, William conveyed to his wife, Mary L., in payment of his indebtedness to her, all his interest in said real estate; and since such conveyance she has been

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the owner, and "she is *now* in and entitled to the possession thereof." March 24, 1896, the appellant recovered a judgment against William B. Dodds, and afterwards caused an execution to be issued upon said judgment, which, upon direction of the appellant, the sheriff levied upon and sold, July 31, 1897, to the appellant, the undivided one-half of said real estate, as the property of William B. Dodds. August 4, 1897, appellant "paid to the sheriff the amount of costs accrued in said action in which said judgment was obtained, and receipted to said sheriff for the balance of the amount of its said bid for said real estate, being the amount that was due it on said judgment" and did receive from the sheriff a certificate of purchase which it now holds. The certificate of purchase now held by appellant casts a cloud on Mary L. Dodds's title. Prayer that the certificate of purchase be canceled and her title quieted.

Appellant's demurrer to these facts was overruled, and it insists that they are insufficient to entitle the appellee, Mary L. Dodds, to the relief prayed, because there is neither an averment that she had caused the deed from her husband to be recorded, nor an averment that appellant had notice or knowledge of the conveyance to her before it perfected the purchase of the land, nor an averment that appellee was in possession under the deed when the land was levied upon and sold.

It is a fundamental principle of pleading that a plaintiff must show affirmatively by his complaint that he is entitled to some relief. Appellee's complaint in substance shows that her husband, having a good record title through the will of Mrs. Humphries to an undivided one-half of the real estate, conveyed it to her by deed before appellant recovered judgment against her husband. For failure to aver the contrary we must presume that she kept her deed from the public record, and that she failed to give notice of her title to appellant before he purchased the property at sheriff's sale eighteen months after the conveyance to her. She alleges

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that she "was in and entitled to the possession" at the time this suit was commenced, from which we must also presume that she was not in possession at the time the lands were levied upon and sold to appellant. This means that by the public records announcing that the husband's title was good, and with nothing known or in appearances to discredit it, the appellee stood by and, without disclosing her claim to the lands, suffered the appellant, innocently believing, as he had a right to believe, that her husband was the owner, to bid upon and purchase the property at an execution sale and to pay the accrued and current costs of sale and acknowledge satisfaction of the judgment against her husband.

Our statutes relating to registration read as follows: Section 3345 Burns 1894. "No conveyance of any real estate in fee-simple or for life or of any future estate, and no lease for more than three years from the making thereof, shall be valid and effectual against any person other than the grantor, his heirs and devisees, and persons having notice thereof, unless it is made by a deed recorded within the time and in the manner provided in this act."

Section 3350 Burns 1894. "Every conveyance or mortgage of lands or of any interest therein, and every lease for more than three years, shall be recorded in the recorder's office of the county where such lands shall be situated; and every conveyance or lease not so recorded in forty-five days from the execution thereof, shall be fraudulent and void as against any subsequent purchaser, lessee, or mortgagee in good faith and for a valuable consideration."

So far as we have observed it has been uniformly held in this State for fifty years, under similar registry statutes, that a purchaser, without notice, at an execution sale has the same defense against unrecorded deeds as a purchaser from the execution defendant. *Orth v. Jennings*, 8 Blackf. 420, 426; *Hosier v. Hall*, 2 Ind. 556, 54 Am. Dec. 460; *Brose v. Doe*, 2 Ind. 666; *Dawkins v. Kions*, 53 Ind. 164, 171; *Pierce v. Spear*, 94 Ind. 127; *Sills v. Lawson*, 133 Ind. 137, 140.

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The fact that appellant is a judgment creditor purchaser makes no difference. Such a purchaser under a valid judgment and sale is no less entitled than a stranger to protection against unrecorded titles and secret claims; and upon the same terms. See *Pugh v. Highley*, 152 Ind. 252, 71 Am. St. 327, 44 L. R. A. 392, and authorities there cited.

The complaint does not show affirmatively either that appellee had caused her deed to be recorded in the recorder's office of the county within forty-five days or before the levy and sale, or notice to appellant, either actual or constructive (as by possession under the deed), before it purchased the property, and the complaint is therefore insufficient. See *Citizens Bank v. Julian*, 153 Ind. 655, 675. Appellant's demurrer should have been sustained.

Judgment reversed and cause remanded, with instructions to sustain the demurrer to the third paragraph of complaint.

WINSLOW v. GREEN, SHERIFF.

[No. 18,963. Filed October 25, 1900.]

CRIMINAL LAW.—*Judgment.*—*Collateral Attack.*—*Habeas Corpus.*—

Where defendant was convicted and committed to jail he will not be released on a writ of *habeas corpus* because there was neither arraignment nor plea asked or entered before proceeding with the trial, where the court had jurisdiction over the subject-matter and the person of defendant.

From the Porter Circuit Court. *Affirmed.*

N. L. Agnew and *D. E. Kelly*, for appellant.

Grant Crumpacker, for appellee.

HADLEY, J.—*Habeas Corpus.* The appellant was arrested, brought into the superior court of Porter county and tried by jury upon the charge of keeping a house of ill fame. He was convicted and adjudged to pay a fine of \$60 and costs. He was neither arraigned nor pleaded to the charge. Upon failure to pay or replevy his fine he was committed to jail.

155	368
155	504

155	368
157	176
157	212

155	368
163	467

155	368
165	70

155	368
167	123

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He afterward set forth the above facts in a petition to the Porter Circuit Court asking thereupon to be granted a writ of *habeas corpus*. The court refused the writ, and from the judgment of refusal he appeals. His contention here is that the judgment is a nullity because there was neither an arraignment nor a plea asked or entered before proceeding with the trial.

This proceeding is a collateral attack upon the judgment of the Porter Superior Court. *Turner v. Conkey*, 132 Ind. 248, 252, 32 Am. St. 251, 17 L. R. A. 509; *Cully v. Shirk*, 131 Ind. 76, 31 Am. St. 414.

To impeach a judgment collaterally the judgment must be absolutely void. *Krug v. Davis*, 85 Ind. 309; *Cohee v. Baer*, 134 Ind. 375, 39 Am. St. 270; *Young v. Sellers*, 106 Ind. 101; *Davis v. Clements*, 148 Ind. 605, 607, 62 Am. St. 539.

It is not denied that the court had jurisdiction both of the subject-matter and the person of the defendant. The contention is that proceeding with the trial without arraignment or plea to the indictment was a trial without an issue and therefore void.

The law is firmly established that, jurisdiction being once obtained over the person and the subject-matter, no error or irregularity in its exercise will make the judgment void. When it thus appears that the court has the power to try and decide, its judgment becomes conclusive as to the matter in controversy between the parties, and, however erroneous, it is unassailable in any collateral proceeding. *Sauer v. Twining*, 81 Ind. 366; *Young v. Sellers*, 106 Ind. 101; *Board, etc., v. Shutter*, 139 Ind. 268, 272; *Bowen v. Hester*, 143 Ind. 511, 517; *Freeman on Judg.*, §135.

The failure to permit the appellant to plead can in no way affect the jurisdiction of the court over the person of the defendant or subject-matter. It can not therefore be reached by a collateral attack.

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A judgment entered before the return day of the summons is an erroneous irregularity but not void, and, while subject to overthrow by a proper proceeding in the same case, is conclusive between the parties in a collateral attack. *McAlpine v. Sweetser*, 76 Ind. 78; *Gum-Elastic, etc., Co. v. Mexico, etc., Co.*, 140 Ind. 158, 162, 30 L. R. A. 700; *Freeman on Judg.*, §126.

The trial of a criminal case without a plea to the indictment is erroneous, but, for such error or irregularity in the exercise of jurisdiction, the complaining party must seek his remedy in the same case by a motion for a new trial and direct appeal.

It is said in *Shoffner v. State*, 93 Ind. 519, at page 520: "It is true, as contended, that a trial without an issue is erroneous. It is also true that a trial upon an indictment, or information, without a plea, constitutes such an irregularity in the proceedings as entitles the defendant to a new trial if the verdict is against him, or, at his option, to have the verdict set aside as contrary to law, but advantage can only be taken of such a defect in the proceedings by a motion for a new trial." *Billings v. State*, 107 Ind. 54; *Graeter v. State*, 54 Ind. 159; *Fletcher v. State*, 54 Ind. 462; *Freeman on Judg.*, §135a.

Some *dicta* in *Sanders v. State*, 85 Ind. 318, 44 Am. Rep. 29, can not be accepted as supporting appellant's position. What was there said arose upon a most extraordinary state of facts, and the cases relied upon, as sustaining what was there said and meant, do not support appellant's construction.

In *Tindall v. State*, 71 Ind. 314, the question arose upon a motion for a new trial and direct appeal, and the court very correctly ruled that the failure to require the defendant to plead to the indictment and the trial without an issue was *erroneous*, not void. To the same effect also are the cases of *Graeter v. State*, 54 Ind. 159; *Fletcher v. State*, 54 Ind. 462.

Judgment affirmed.

Hedrick v. Hall.

HEDRICK v. HALL ET AL.

[No. 18,842. Filed October 26, 1900.]

APPEAL AND ERROR.—*Assignment of Error.—New Trial.*—Alleged error of court in refusing to compel a witness to answer a question is not the subject of an independent assignment of error, but must first be presented by motion for a new trial. *pp. 372, 373.*

SAME.—*Judgment.—Default.—Practice.*—Error cannot be predicated upon the action of the court in failing to render judgment against defendants who failed to appear or were defaulted, where plaintiff proceeded to trial against the other defendants, as if no default had been made, and did not ask for judgment by default against those who failed to appear. *p. 373.*

SAME.—*Assignment of Error.—New Trial.*—Assignments that the finding of the court is contrary to the evidence, and contrary to law, are not subjects of independent assignments of error, but are causes for a new trial, and must be presented on appeal under motion for a new trial. *p. 373.*

FRAUDULENT CONVEYANCES.—*Evidence.*—A conveyance of real estate will not be set aside as fraudulent as against creditors, where the evidence showed that the conveyance was made upon a valuable consideration, and that the grantee took the same without knowledge of any intended fraud. *pp. 373, 374.*

SAME.—*Exemption.*—A conveyance of real estate will not be set aside as fraudulent against creditors, where the value of the land conveyed did not exceed the amount to which the grantor was entitled as exempt from execution. *pp. 373, 374.*

From the Brown Circuit Court. *Affirmed.*

Shelby Hedrick, for appellant.

R. L. Coffey and *D. W. Howe*, for appellees.

DOWLING, J.—Suit upon a promissory note executed by the appellees, Peter Hall and Jesse Hall, to the appellant, and to set aside as fraudulent certain conveyances of land alleged to have been made by the said Peter Hall and Jesse Hall, and to subject such lands to the payment of appellant's claim. The record is an imperfect one, and contains none of the pleadings excepting the amended complaint, nor any entry relating to those filed by the de-

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fendants below. On the application of the appellant, a change of judge was granted, and an attorney of the Bartholomew Circuit Court was appointed, and proceeded to try the cause. The attorneys for Clara Brown, one of the defendants below, withdrew her appearance, and also withdrew the answers filed on behalf of the said Clara Brown, Elizabeth J. Hall, and Jesse Hall. These persons were then called, and are said to have made default, but no further entry concerning them appears in the record, nor was any judgment against them asked for by the appellant. The cause was tried by the court, and a general finding made in favor of the appellant upon the note sued on, against Peter Hall and Jesse Hall, its makers, and in favor of the other defendants, who were the persons to whom the conveyances alleged to be fraudulent were made.

A motion for a new trial was overruled, and judgment was rendered upon the finding. Mrs. Hedrick, the plaintiff below, appealed, and errors are assigned as follows: "(1) The court erred in refusing to compel the defendant, Rebecca Axom, to answer plaintiff's question as to where she kept her money while saving it up, and how she earned or got the money to pay \$800, cash, on the farm to her father; (2) the court erred in overruling appellant's motion for a new trial; (3) the court erred in his finding and judgment for the defendants, Elizabeth Jane Hall, Jesse Hall, Peter Hall, Clara Brown, and Jesse Sinn, when they made a default by not appearing to this action, by denying judgment for appellant on their default; (4) the verdict of the court was contrary to the evidence; (5) the findings of the court were contrary to law."

The first error assigned is not available to the appellant, because it was not set out in the motion for a new trial as one of the reasons therefor.

The general rule of appellate practice is that matters which constitute grounds for a new trial must first be presented by motion for that purpose, and cannot be assigned

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as independent errors. As the rulings of the court referred to were not among the reasons given for a new trial, and as they cannot be assigned as independent errors, we cannot examine them on this appeal. *Zimmerman v. Gaumer*, 152 Ind. 552, and cases cited; *Hunt v. Listenberger*, 14 Ind. App. 320.

The appellant is not in a situation to take advantage of the error, if error occurred, in the failure of the court to render a judgment against the defendants, Elizabeth Jane Hall, Jesse Hall, Peter Hall, Clara Brown, and Jesse Sinn, upon their supposed default. The record does not show that Peter Hall and Jesse Sinn failed to appear. The appellant neither took, nor at any time asked for, a judgment against the persons who failed to appear, or whose answers were withdrawn. She proceeded to trial, and the evidence was introduced on behalf of both the plaintiff and the defendants below as if no default had occurred. The demand for judgment against the defaulting parties is made for the first time in this court, and, therefore, it comes too late.

The *fourth* and *fifth* assignments of error, viz., that the finding of the court is contrary to the evidence, and contrary to law, state causes for a new trial, and are properly set out in the motion therefor, but they should not have been assigned as errors.

The *second* error assigned is that the court erred in overruling appellant's motion for a new trial. Two causes only are mentioned in the motion. These are that the finding of the court is contrary to the evidence, and that it is contrary to law. No question is presented upon this assignment excepting that of the sufficiency of the evidence to sustain the finding. We have examined the record and found that there was a total failure of proof on the part of the appellant as to the fraud charged upon the appellees. There was evidence showing that each conveyance of land was made upon a valuable consideration; that the grantees took the same without knowledge of any intended fraud, and

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that the value of some of the interests conveyed did not exceed \$600, the amount exempted from execution by statute. *Blair v. Smith*, 114 Ind. 114, 5 Am. St. 593; *Isgrigg v. Pauley*, 148 Ind. 436; *Rockland Co. v. Summerville*, 139 Ind. 695; *Fulp v. Beaver*, 136 Ind. 319; *State, ex rel., v. Osborn*, 143 Ind. 671.

We are not at liberty to weigh the evidence; but, if we were, we could not avoid the conclusion that it fully sustains the finding of the court. Judgment affirmed.

COVERDALE ET AL. v. EDWARDS.

[No. 18,836. Filed October 30, 1900.]

APPEAL AND ERROR.—Harmless Error.—In an action against a city marshal and others for damages for removing electric light poles and wires belonging to plaintiff, the alleged error of the court in sustaining a demurrer to defendants' answer in justification is not available to appellants where they admitted in their brief that the court permitted all evidence to be admitted under the general denial which would have been admissible under the answer in justification. pp. 375, 376.

LICENSES.—Electric Light Companies.—Municipal Corporations.—A grant to an electric light company to plant and erect poles in the streets of a city for the purpose of furnishing electric lights to the citizens of such city, reserving the right on the part of the city to revoke the grant, and demand that the poles be removed, and remove the same if necessary, constituted a bare license, revocable without cause at the will of the city council. pp. 380, 381.

SAME.—Electric Light Companies.—Municipal Corporations.—The provision of §4803 Burns 1894, authorizing cities to grant by resolution or ordinance, under such restrictions as the common council may deem proper, to any person or corporation, the right to maintain in the streets, alleys, and other public places in such city, poles, wires, and other necessary appliances for the purpose of supplying electric or other light, carries with it the right to impose any terms on the grant not forbidden by law, and the discretion of the common council is not confined to the mere restriction of methods of use, but extends to restriction of time. pp. 380, 381.

MUNICIPAL CORPORATIONS.—Resolutions.—Preamble.—The preamble of a resolution may be looked to in aid of the interpretation of an ambiguity in the resolution, but, if the terms of the resolution are clear, the preamble cannot be allowed to cast a doubt upon the meaning. p. 382.

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MUNICIPAL CORPORATIONS.—Resolutions.—Motives of Council.—In an action against city officers for damages for removing plaintiff's electric light poles and wires from the streets, the motives or influences that led the councilmen to pass the resolution ordering such removal were irrelevant where the subject-matter was within the scope of their authority. *p. 382.*

SAME.—Licenses.—Cancelation.—Removal of Electric Light Poles from Street.—Where, by the terms of a grant to an electric light company to occupy the streets of a city, the common council thereof had authority to terminate the license at will, the failure of the company to remove its poles on receiving legal notice from the council so to do, rendered them a nuisance *per se*, and the city had the right to remove them summarily. *pp. 382, 383.*

APPEAL AND ERROR.—Joint Assignment.—Where on appeal from a judgment against certain city officers for damages for removing electric light poles from the streets of the city the evidence established the defense of justification on the part of some of the defendants only, the judgment will not be reversed for such reason on a joint motion on the part of all of the defendants for a new trial. *p. 383.*

JUDGMENTS.—Excessive Damages.—A judgment against the city marshal and members of the common council for damages in the sum of \$4,000 in favor of an electric light company for the removal of its poles and wires from the street, was excessive, where the city had the right to remove the poles, since the measure of damages was the difference in value between the poles and wires properly removed and as they were actually removed. *pp. 383, 384.*

From the Allen Circuit Court. *Reversed.*

Mann & Beatty, J. T. France and O. N. Cranor, for appellants.

Peterson & Peterson, H. F. Colerick, C. J. Lutz, R. K. Erwin and P. G. Hooper, for appellee.

BAKER, C. J.—This action was begun in the Adams Circuit Court. The venue was changed to Wells and thence to Allen. Appellee's complaint charged that appellants, in pursuance of a conspiracy to injure appellee, maliciously cut down certain poles and electric wires belonging to appellee and lawfully maintained by him in the streets of the city of Decatur, Indiana, thereby destroying his property and business, to his damage in the sum of \$15,000. Appellants filed answers in general denial and in justification. Appellee's demurrer was sustained to the answers in justifi-

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cation. The trial resulted in a general verdict and judgment in favor of appellee for \$4,000. Appellants' joint motion for a new trial was overruled. The joint motion of two appellants, the city attorney of Decatur and his law partner, for a new trial was overruled. Errors are assigned on each adverse ruling.

Inasmuch as the appellants admit in their brief that the court allowed them under their general denial to introduce all the evidence that would have been admissible under their answers in justification, the error, if any, committed in sustaining the demurrer is not available to appellants.

The principal contentions are that the verdict is not sustained by the evidence and is contrary to law and that the damages are excessive.

Of the thirteen appellants, five were councilmen of the city of Decatur, one was the city attorney, one was the city attorney's law partner who joined in advising the council, one was the city marshal, and five were persons employed by the marshal to assist him in executing the commands of the council. In 1889 the council adopted the following resolution: "Resolved that the Thompson & Houston Electric Light Company be and are hereby given and granted permission to plant and erect poles in the streets and alleys of Decatur for the purpose of stringing wires thereon to furnish electric lights to the citizens of said city. The planting of such poles shall be made under the direction of the street commissioner of said city and he shall see that the same are not erected so as to inconvenience said citizens. The said council hereby reserve the right to revoke this grant, and demand that the poles be removed, and remove the same if necessary." The Thompson & Houston Company erected certain poles and wires, and afterwards conveyed the property to appellee and assigned to him the rights under the foregoing resolution. The city did not formally consent to the assignment; but in 1893 the city entered into a contract with appellee whereby appellee was engaged to

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supply the city with a certain number of street lights for three years at so much per light per year. After the expiration of this contract, the city decided to put in an electric light system for itself. On August 18, 1897, the council adopted the following resolution: "Whereas the common council of the city of Decatur, Indiana, on the 10th day of February, 1893, entered into contract with one J. D. Edwards whereby said Edwards agreed to supply the city of Decatur with a certain number of street lights for the term of three years at a certain price per light per annum, which contract is spread of record in the records of proceedings of the common council of the said city of date of February 21, 1893; and whereas the contract under which the said Edwards furnished the said city with electric lights expired on the 10th day of February, 1896, and has not been renewed, but was by resolution of the said common council discontinued on the 13th day of July, 1897; and whereas under the said contract the said Edwards erected a number of poles in the streets, alleys and public grounds of the said city, and strung wires and lamps thereon for the purpose of supplying the said electric lights to said city for street purposes, which poles, wires and lamps are now not being used and are in the way of others which the said city proposes to erect for the construction of an electric light plant to be owned and controlled by the said city; therefore be it resolved that the city marshal be and he is hereby directed to notify the said J. D. Edwards to take down and remove all his poles from the streets and alleys and public grounds of the said city within fifteen days from the date of the receipt of the notice or the same will be removed by said marshal under and by order of the common council; and be it further resolved that, should the said Edwards fail or refuse to remove or cause to be removed all such poles, wires and lamps from the said streets, alleys and public grounds within the time mentioned in the said notice, the said marshal shall procure sufficient help and remove the

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said poles, wires and lamps immediately thereafter." On August 19, 1897, the marshal served upon appellee the following notice. "To J. D. Edwards: You are hereby notified that the common council passed a resolution at their meeting held August 18, 1897, ordering the removal of all your poles, wires and electric lamps from the streets, alleys and public grounds of the city of Decatur, Indiana, within fifteen days from the date of the receipt of this notice by you. You are therefore hereby notified to remove or cause to be removed all the electric light poles, wires and lamps now erected and maintained by you in any of the streets, alleys or public grounds in said city within fifteen days from this date, or I will, under orders of the said council, cause the same to be taken down and removed far enough that they will not interfere with the erection of new poles, wires and lamps to be erected by said city. Dated this 19th day of August, 1897. M. F. Cowan, city marshal." At the time of passing the resolution of August 18, 1897, the members of the common council did not know of or did not remember the grant of 1889. Appellee removed some of the poles and wires that had been used in lighting the streets, but left standing others of that line and all of the line used in supplying lights to individuals. By September 28, 1897, the construction of the city's line had reached the places where appellee's poles and wires were left standing. The marshal had not yet executed the order contained in the resolution of August 18th. At their regular meeting on the evening of September 28th, the common council, in executive session, passed the following resolution: "Whereas, on the 18th day of August, 1897, the common council of the city of Decatur, Indiana, ordered the removal of the electric light poles, lamps and wires of J. D. Edwards from the streets, alleys and public grounds of said city within fifteen days from the date of the receipt of notice by him; and whereas, in accordance with the resolution then adopted, the marshal of said city noti-

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fied the said Edwards on the 19th of August, 1897, to take down and remove within fifteen days all such poles, wires and lamps from the streets, alleys and public grounds of said city; and whereas the said Edwards has only partially complied with the requirements of said resolution and has left standing on Main or Second street, between Jefferson and Jackson streets, all his poles, lamps and wires the same as before the adoption of said resolution and service of such notice; and whereas it is imperative that the city of Decatur shall have the immediate use of Second street from Jefferson street to Jackson street on both sides thereof; therefore be it resolved that the city marshal be and he is hereby ordered to employ sufficient force of men to immediately remove from said Second street between Jefferson street and Jackson street all poles, wires and lamps belonging to said J. D. Edwards by removing the wires and lamps and cutting down the poles, doing as little damage to the poles, wires and lamps as under the circumstances is practicable." After the adjournment of the meeting, some of the members of the common council directed the marshal to remove appellee's poles and wires that night. One of the attorneys notified a workman that the marshal would need his services. About two o'clock that night the marshal and his assistants cut the wires and sawed off the poles from six inches to two feet above the ground. The consequence was that appellee was unable longer to conduct his business. The marshal and those who assisted him in removing the poles and wires acted solely in obedience to the orders of the council, and not at all from any intention or willingness to injure appellee. The foregoing facts are shown by the evidence without conflict.

The objections to the evidence and the disputes as to the facts arose mainly with reference to the motives of the councilmen and the amount and elements of damages.

The councilmen claimed that, in deciding that the city should own a plant for itself, and in passing the resolutions

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hereinabove set forth, they in good faith exercised only their best judgment as councilmen in the city's interests. They claimed that, in ordering the removal of the poles and wires during the night of September 28th, they were influenced only by the considerations that the city needed the immediate use of the streets, that the removal at night would avoid interference with traffic and possible accidents to onlookers and breaches of the peace, and that further postponement might result in the city's becoming involved in a suit by appellee to restrain any removal. On the other hand, there was evidence from which a jury might infer that some of the appellants who were councilmen were actuated by a malicious intention to injure appellee.

The court, in the admission of evidence and in the instructions to the jury, submitted the question of damages on these elements: the destruction of appellee's business; the loss of the power-house, erected on leased ground and forfeited under a condition by which appellee's rights should continue only so long as he conducted his electric light business; and the difference in value between the poles, wires and lamps when standing ready for use and when torn down. Appellee had been making \$100 a month, net, from the operation of his plant. The highest valuation on the power-house was \$500. The highest valuation on the poles, wires and lamps when standing ready for use was \$511. The lowest valuation on the poles, wires and lamps when torn down was naught.

The first question concerns appellee's rights in the streets at the time of the alleged trespass. The control of streets, as well as of all other public highways, is primarily in the legislature. But the legislature has delegated to municipalities the exclusive control of their streets and alleys. §3623 Burns 1894, §3161 R. S. 1881 and Horner 1897. As the legislature gave, so that body may take away or modify, the power. There is no doubt of the legislature's authority to grant to individuals and corporations the right to erect

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poles and wires upon the streets of a municipality without its consent or over its objection. *Town of New Castle v. Lake Erie, etc., R. Co., ante*, 18, and cases there cited. But the legislature, far from granting such a right, has expressly committed this subject to the discretion of the municipality. Section 4303 Burns 1894, §3106c Horner 1897, provides that any city is hereby authorized to grant by resolution or ordinance, under such restrictions as the common council may deem proper, to any person or corporation, the right to erect and maintain, in the streets, alleys and other public places of such city, posts, poles, wires, and other necessary appliances, for the purpose of supplying electric or other light. The grant to the Thompson & Houston Company was made under this statute. It was a personal license, not assignable without the consent of the city. But the contract of 1893 ratified the assignment and made the license irrevocable during the life of the contract. At the expiration of the contract, appellee stood as the lawful assignee of the Thompson & Houston Company's license. That license contained this provision: "The said council hereby reserve the right to revoke this grant, and demand that the poles be removed, and remove the same if necessary." The language is clear and the meaning unmistakable. The grant was a bare license, revocable without cause at the will of the council. If the licensee, at the revocation of the grant, should not remove the poles on demand, the council might cause their removal. Appellee claims that, under §4303, above, the council may restrict the method of use but may not limit the time. The legislature confided an unreserved discretion to the council. The unqualified right to grant or refuse at discretion carries with it the right to impose any terms on the grant not forbidden by law. The discretion of the council is not confined by the law to the mere restriction of methods of use, and therefore extends to restriction of time. *City of Indianapolis v. Navin*, 151 Ind. 139, 143, 41 L. R. A. 337; *Citizens St. R. Co. v. City R. Co.*, 64 Fed. 647, 656.

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Appellee next contends that, even if the council had the right to terminate the license as a whole, the resolution of August 18th and the notice of August 19th, were not effective to end appellee's right to maintain his commercial plant. The argument is based on recitals in the preamble. The preamble is no part of the resolution. A preamble may be looked to in aid of the interpretation of an ambiguity in a resolution. But if the terms of a resolution are clear, a preamble can not be allowed to cast a doubt upon the meaning. 23 Am. & Eng. Ency. of Law 329-331. Here, the resolution in explicit terms ordered appellee to remove all his poles that were maintained in the streets and alleys of Decatur; and the notice followed the resolution. But if outside matters were to be taken into consideration in determining the meaning of the resolution, the fact that the council on August 18th had forgotten or did not know of the Thompson & Houston Company's license would indicate that they supposed that appellee had no license except the one which was implied by the contract of 1893 and which became a bare license revocable at will in 1896. Under this view, the preamble, like the body of the resolution, was aimed at appellee's entire system.

Appellants, in their relations to the resolutions and acts thereunder, are naturally divisible into three groups: the councilmen, the marshal and those who assisted him in the removal of the poles, and the attorneys of the city.

The motives or influences that led the councilmen to pass the resolutions were irrelevant, if the subject-matter was within the scope of their authority. Throop, Public Officers, §709; Mechem, Public Officers, §§644-646; *Buell v. Ball*, 20 Iowa 282; *Freeport v. Marks*, 59 Pa. St. 253. What poles and wires should be permitted in the streets was a question in relation to which the councilmen owed a duty to the public, and not at all to individuals. If an individual was affected, it was immaterial unless a contract

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was violated. The nature of appellee's contract-right in the streets has already been considered. The council had authority to terminate the license at will. The remaining question is in regard to the steps the city might lawfully take in effecting the removal of the poles and wires. There is no doubt of the right of the city to begin legal proceedings to that end (*American Furniture Co. v. Town of Batesville*, 139 Ind. 77); and appellee claims that this was the only way. Is that true? If appellee had erected the poles in the streets without any lawful authority to do so, the poles would have constituted a public nuisance *per se*. *City of Valparaiso v. Bozarth*, 153 Ind. 536, 45 L. R. A. 487, and cases cited. If the poles were erected under lawful authority, and if the authority was legally canceled, appellee's failure or refusal to remove the poles after notice would render them a nuisance *per se*, and the city's right would then be complete to remove them summarily. *City of Indianapolis v. Miller*, 27 Ind. 394; *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 13 L. R. A. 454; *Note to Orlando v. Pragg*, 34 Fla. 244, 19 L. R. A. 196; *Note to City of Evansville v. Miller*, 146 Ind. 613, 38 L. R. A. 161. So it appears that in respect to both the termination of appellee's license and the method of effecting the removal of the poles the subject-matter of the resolutions was within the scope of the authority of the councilmen. As the evidence fails to show that they advised or assisted in any abuse of the order of removal, the record establishes their defense of justification. But their motion for a new trial cannot be sustained on the ground that the verdict is contrary to law, unless there is no liability on the part of the marshal and his assistants, for their motion is joint with that of the marshal.

The marshal and his assistants are liable for any abuse of the order of removal. Throop, Public Officers, §724; Mecham, Public Officers, §664. On the question whether

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the marshal caused more than unavoidable injury in removing the poles and wires, the evidence is conflicting, and therefore the verdict can not be disturbed on that account. But the damages awarded are clearly excessive. The unfortunate destruction of his business fell upon appellee as the proximate result, not of the marshal's abuse of the order of removal, but of the termination of his license and the order of removal properly executed. The loss of his power-house was due to the terms of appellee's lease, and was not legally attributable to the marshal's acts. Even with respect to the poles and wires, the question of damages was not properly submitted to the jury. The measure is the difference in value between the poles and wires properly removed and as they were actually removed. All of the appellants are entitled to a new trial on the ground that the damages are excessive.

As the city's attorneys correctly advised the council in respect to the scope of the city's authority, no question arises as to the circumstances under which, and the persons to whom, the attorneys would be liable for wrong advice. The evidence fails to show that they counseled or assisted in any abuse of the order of removal. Their joint motion for a new trial, separate from that of all the appellants jointly, should have been sustained on the ground that the verdict is contrary to law.

Justification is a defense that must be affirmatively pleaded. On the trial now in review, appellants were not injured by the ruling on the demurrer, because they admit that they were permitted to introduce all their evidence under the general denial. But on a new trial, appellants should have a legal basis for the introduction of their evidence.

Judgment reversed, with directions to overrule the demurrer to the affirmative answers.

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THE STATE v. OSBORN ET AL.

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[No. 19,497. Filed October 31, 1900.]

RECOGNIZANCE.—Action Against Sureties.—Defense.—Indictment in Another County.—In an action against the sureties on the forfeited recognizance of one charged with a felony, it is no defense that the accused had been indicted for the same offense in another county. pp. 386-390.

SAME.—Action on Forfeited Recognizance.—Insufficiency of Affidavit.—The insufficiency of an affidavit and information, in that they failed to show that the person whose name was signed to the jurat was an officer authorized to administer oaths, is no defense to an action on a forfeited recognizance. p. 390.

SAME.—Action on Forfeited Recognizance.—Defense.—In an action against the sureties on a forfeited recognizance, it is no defense that the State, in attempting to arrest the accused on an indictment in another county for the same crime, caused the accused to conceal himself so that the sureties were unable to perform their obligation. pp. 392, 393.

From the Parke Circuit Court. *Reversed.*

W. L. Taylor, Attorney-General, *J. M. Johns*, *F. F. James*, *Merrill Moores* and *C. C. Hadley*, for State.

J. T. Johnson, *J. S. White*, *D. H. Maxwell* and *H. Maxwell*, for appellees.

MONKS, J.—An affidavit and information charging one Joel C. Osborn with having committed the crime of rape in Parke county, Indiana, were filed in the court below. The court ordered a bench warrant to be issued thereon to the sheriff of said county, who arrested said Osborn. Said Osborn appeared in open court on said day, in person and by counsel, and moved the court to quash the affidavit and information, which motion was by the court overruled. Osborn thereupon waived an arraignment, and entered a plea of not guilty to said charge, and, on motion, the cause was continued until the next term of the court, and said Osborn and appellees duly entered into a continuing recognizance

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for the appearance of the accused to answer said charge. At the next term of the court, the accused failing to appear and answer said charge, said recognizance was duly forfeited, and a judgment of forfeiture was duly entered of record by the court.

Suit was instituted against appellees, the sureties on said recognizance, and they filed an answer in two paragraphs. Appellant's demurrer to each of said paragraphs of answer was overruled. A reply was filed to said answer, to which a demurrer for want of facts was sustained by the court, and, appellant failing and refusing to plead further, judgment was rendered in favor of appellees. The only errors assigned and not waived call in question the sufficiency of each paragraph of answer.

It is alleged in the first paragraph of answer that the facts upon which the accused was charged occurred wholly in Vermillion county, and not in Parke county; that the crime, if any there was, was committed in Vermillion county; that, since the filing of said affidavit and information in the cause in which said recognizance sued upon was given, the grand jury of Vermillion county, Indiana, has presented an indictment against said Joel C. Osborn, wherein and whereby he is charged with the identical and same crime charged against him in the affidavit and information pending in this court, in which action this recognizance was given; and that said indictment is now pending in the Vermillion Circuit Court, and that said court has jurisdiction of the crime charged.

The second paragraph of answer contains the same allegations as the first paragraph, and it is further alleged that the jurat to the affidavit in the case in which said recognizance was given, was as follows: "Subscribed and sworn to before me, this 15th day of May, 1889." Signed "J. E. Harshbarger". "That after the arrest of said Osborn on the warrant in said cause, and after the recognizance sued upon was given, an affidavit was filed before a justice of the

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peace in Vermillion county, Indiana, charging said Osborn with the same crime as having been committed in that county; that a warrant was issued thereon by said justice of the peace, and placed in the hands of a constable for service, who at once took the same to the home of the said Joel C. Osborn, for the purpose of arresting him on said charge; that said Osborn was near his home in Parke county, and made no effort to leave said county, or conceal himself from the sureties on his recognizance, or any officer or person, but, on learning that the constable was seeking to arrest him on said charge, concealed himself from said constable and departed from said Parke county, and has remained away and concealed, and where he is now is unknown to these defendants; that said departure and concealment would not have occurred had not said constable sought to arrest him on said warrant for said charge so filed by the State of Indiana before said justice of the peace; that a warrant was issued on the indictment in the Vermillion Circuit Court, which the sheriff of that county has been endeavoring to execute, which indictment and the case before said justice of the peace are now pending; that when the prosecuting attorney asked the court to enter a judgment of forfeiture of said recognizance, and before any steps were taken for that purpose, these defendants, sureties on said recognizance, filed written objections to said forfeiture (being the same, in substance, as the matters set up in the first paragraph of answer), which objections were overruled by the court, to which appellees excepted." It is insisted by appellees that the facts alleged in said paragraphs of answer show that the Parke Circuit Court had no jurisdiction of the offense charged in the affidavit and information and could not legally require the accused to enter into the recognizance sued upon. That the commencement of a prosecution for the same offense before a justice of the peace of Vermillion county, and the issuance of the warrant for the arrest of said Joel C. Osborn by said justice, and the re-

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turn of said indictment in Vermillion county as alleged, amounted to a dismissal or discontinuance of the case in which the recognizance was given.

It is true that it has been decided that a recognizance taken in a case where the court has no jurisdiction cannot be enforced. *State v. Winninger*, 81 Ind. 51, 53; *State v. Wenzel*, 77 Ind. 428, 430. Jurisdiction is the authority to hear and determine a cause. *Lantz v. Maffett*, 102 Ind. 23, 28, and cases cited. *Quarl v. Abbett*, 102 Ind. 233-239, 52 Am. Rep. 662, and cases cited. *Board, etc., v. Markle*, 46 Ind. 96; *Smurr v. State*, 105 Ind. 125, 127; *Spencer v. McGonagle*, 107 Ind. 410, 416. The rule is that when a court has jurisdiction of the general subject and its jurisdiction of the particular case depends upon a fact or facts which are to be tried and determined, the decision of the tribunal, even though erroneous, is not void, but is conclusive against collateral attack. *Tucker v. Sellers*, 130 Ind. 514, 517, and cases cited. *McEneney v. Town of Sullivan*, 125 Ind. 407, 412, and cases cited.

The affidavit and information charged the accused, Joel C. Osborn, with a felony, and that it was committed in Parke county, Indiana. In said criminal cause it was necessary to prove that the offense was committed in the county of Parke as alleged, the same being the territorial jurisdiction of the said court, in order to entitle the State to a conviction. The fact that the offense set forth in an indictment or affidavit and information was actually committed in a county other than the one alleged does not affect the jurisdiction of the court to try and determine the cause, for the reason that the jurisdiction over the subject-matter of the offense charged depends upon the allegations of said indictment or affidavit and information, and not upon the actual facts. As the allegation that the offense was committed in said county gave the Parke Circuit Court jurisdiction to try said cause, and hear the evidence, and necessarily, therefore, the power to decide the cause, it follows

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that if the accused had gone to trial on his plea of not guilty, and the evidence had failed to show that the offense was committed in Parke county, or if it showed that said offense was committed, but not in said county, a conviction would have been erroneous, but not void. This is true, because the authority to decide at all involves the authority to decide wrong as well as right. *Spencer v. McGonagle*, 107 Ind. 410, 416, 417; *Lantz v. Maffett*, 102 Ind. 23, 28; *Snelson v. State*, 16 Ind. 29. Such conviction would therefore have been conclusive against collateral attack not only as to the commission of the offense but that the same was committed in Parke county as alleged. See authorities heretofore cited. The only relief from the judgment in such case would have been by presenting the question to the trial court by a motion for a new trial, and, if overruled, an appeal to the proper court. Said Parke Circuit Court, having jurisdiction to try and determine the case set forth in the affidavit and information, had full and complete jurisdiction to require that said recognizance be given. If, on the trial of a criminal cause, proof that a crime was committed without the territorial jurisdiction of the court, that is, in a county other than the one alleged, does not affect the jurisdiction of the court to try said cause and determine either right or wrong, it is clear that such an allegation and proof in an action on a forfeited recognizance would be no defense thereto nor prevent a recovery thereon.

It is evident that the question of the guilt or innocence of Joel C. Osborn of the offense charged in the affidavit and information can not be presented or tried in an action on said forfeited recognizance, nor is his innocence a defense thereto. *Dilley v. State*, 2 Idaho 1011, 1014, 29 Pac. 48. If not, then no facts contradicting any allegation contained in said affidavit and information, the proof of which would be essential to his conviction in said cause, will constitute a defense to said action on said forfeited recognizance. This is true because the recognizance was given to secure

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the presence of the accused in order that the truth of said allegations might be tried and determined in said criminal cause. To hold that such defenses could be made in an action on a forfeited recognizance would defeat the purpose for which the same was given.

In an action on a forfeited recognizance, it is no defense that the indictment or affidavit and information in the case in which it was taken were not sufficient. *Friedline v. State*, 93 Ind. 366, 370; *State v. Gachenheimer*, 30 Ind. 63, 64; *Adams v. State*, 48 Ind. 212, 213, 214; 1 Bishop's *Crim. Proc.* (4th ed.), §264k; 3 *Am. & Eng. Ency. of Law* (2nd ed.), 713. If this is true, it certainly follows that it is no defense in an action on a forfeited recognizance to allege and prove that any one or all of the allegations of the criminal charge were in fact false. *Dilley v. State*, 2 Idaho 1011, 1014, 29 Pac. 48.

It is urged that there is nothing to show that "J. E. Harshbarger", whose name is signed to the jurat, was an officer authorized to administer oaths, and that therefore the court had no jurisdiction of the cause.

In *Mountjoy v. State*, 78 Ind. 172, the jurat was signed "J. R. Christian, Clerk". There was a motion to quash overruled, and an exception. It was urged that the affidavit did not show that it was sworn to before an officer authorized to administer oaths, and that the addition of "Clerk" to the name was too indefinite and uncertain as to his office and character. This court said: "The courts take judicial notice of the names and signatures of their officers, and it will be presumed that J. R. Christian was the clerk of the court below, and that he signed the jurat as such clerk, as that court sustained the validity of the affidavit. *Hipes v. State*, 73 Ind. 39; *Buell v. State*, 72 Ind. 523; *Brooster v. State*, 15 Ind. 190."

In *Brooster v. State*, 15 Ind. 190, the jurat was signed "J. C. Applegate", and the appellant moved to quash the affidavit on the ground that "it does not appear to have been

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taken before an officer authorized to administer oaths." The motion was overruled and on appeal this court said: "And did it appear that 'J. C. Applegate,' before whom it purports to have been taken, was not an officer of that character, the objection would have been available. But the affidavit, on its face, shows that it was made in Carroll county, and the motion to quash having been refused, it must be presumed that the court was fully advised that 'J. C. Applegate' was an officer authorized to administer oaths."

In the cases cited, *supra*, the attacks on the affidavits were direct by appeal, and the affidavits were sustained, while here the attack is collateral. The court overruled a motion to quash said affidavit and the information, based thereon, which affidavit the record shows was made in Parke county, and we must presume as against this collateral attack that the court was fully advised that said "J. E. Harshbarger" was an officer authorized to administer oaths. Indeed the record certified to this court shows that J. E. Harshbarger was clerk of the Parke Circuit Court. Besides, the action of the court in overruling said motion to quash was not subject to collateral attack. Van Fleet's Coll. Att., §17, p. 23. Moreover, this objection to the affidavit only calls in question its sufficiency, which we have shown can not be done in this action. *Friedline v. State*, 93 Ind. 366; 1 Bishop's Crim. Proc. (4th ed.), §264k; 3 Am. & Eng. Ency. of Law (2nd ed.), 713.

If a man is indicted for a rape alleged to have been committed in one county, and is indicted for a rape alleged to have been committed on the same woman in another county, he is charged with the commission of two rapes, although in fact he may not be guilty as charged in either case, or may be only guilty of the rape charged in one of the cases.

Under the allegations of the answer it can not be said that Joel C. Osborn was charged with the same offense three times, once in Parke county by affidavit and information,

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and twice in Vermillion county, once by indictment and once by affidavit. It may be true that he was charged twice with the same offense in Vermillion county, but said answer shows that he was charged with two rapes on the same woman, once in Parke county and the other in Vermillion county. The court in each county had the same jurisdiction over the criminal case there pending that it would have had if no case had been pending in the other county. It had the power to try and determine the case, require that a recognizance be given, and to adjudge a forfeiture for a breach of any of its conditions. Even if the accused had been indicted in the Parke Circuit Court for the same offense that was charged in the affidavit and information in that court, the pendency of one of said cases could not have been answered in abatement of the other, for the reason that, until the accused had incurred a jeopardy in the case set up in the plea in abatement, its pendency would not avail him for any purpose, nor could he even compel the prosecutor to elect as between said actions. *Dutton v. State*, 5 Ind. 533; *Hardin v. State*, 22 Ind. 347; *Haase v. State*, 8 Ind. App. 488, 493; Gillett's Crim. Law (2nd ed.), §764, p. 596.

It is unnecessary to determine whether or not the part of the answer which alleges said objections and the action of the court thereon, and seeks to review said ruling in this action is a collateral attack on the judgment of forfeiture, because, even if said action of the court could be so reviewed in this case, the same was not erroneous, but proper. This is clearly shown by what we have said concerning the same facts which were alleged in the answer.

It is next insisted by appellees that the State, by attempting to arrest the accused, caused him to conceal himself so that they were unable to perform the conditions of their obligation and that they were thereby released from liability on the recognizance.

It is said that a man's sureties on a recognizance for his

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appearance in a criminal case "are his jailers of his own choosing, and the spirit of their obligation is that they will as effectually secure his appearance and put him as much under the power of the court as if he were in the custody of the law. If the bail permit their principal to leave the state to go into another state they do so at their peril, and if he be there arrested, or taken ill, or confined in an insane asylum, and cannot be removed thence to fulfil the conditions of their obligations, they will be liable for the default." 3 Am. & Eng. Ency. of Law (2nd ed.), 710, 711. So the appellees were the jailers of their principal under the recognizance sued upon, and if he failed to appear, according to the conditions of said recognizance, they are liable for the default.

It is held in some jurisdictions that when the principal, after giving a recognizance, is rearrested in the same cause, in pursuance of proper authority, or upon his appearance for trial is ordered into custody of the sheriff, that such arrest operates as a discharge of the sureties on said recognizance. The reason given for this rule is that the consideration accruing to the sureties is their custody of the principal, and the right to arrest and surrender him, and that, when this consideration fails, their liability ceases. If the arrest is illegal, it will not have this effect. The subsequent arrest of the principal on another charge does not operate *ipso facto* as a discharge of the sureties. 3 Am. & Eng. Ency of Law (2nd ed.), 718, 719. See, however, *State v. Warwick*, 3 Ind. App. 508. It has not been held, however, by any court, so far as we are advised, that the flight of a principal to avoid arrest in the same or another case will discharge his sureties.

As it is not alleged that said accused was rearrested in the same case, or arrested in either of the cases filed in Vermillion county, it is not necessary to decide, and we do not decide, whether or not said arrests, or either of them, if made, would have discharged the sureties on said recogni-

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the stream, where the large number kept therein always found plenty of water, which water privilege was of great value and enhanced the value of appellees' farm; that prior to the use of the stream by appellant the stream contained fish suitable for food with which appellees supplied their table. In 1894 appellant completed its said mill to manufacture paper and other products from straw, and has continuously, since completion to this date, operated said mill in the manufacture of paper, and used therein a large amount of straw and water with lime and one and one-half gallons per day of muriatic acid, eighteen degrees in strength, and from said mill discharged into the stream per day about 500,000 gallons of water containing in suspension a large amount of matter which was inert and innocuous and which was deposited in the bottom and along the sides of the stream, and which water also carried in solution into the stream a large amount of fermentable and putrescible matter which would ferment and putrefy and give off noxious and offensive odors, injurious to health and comfort; that the inert matter so deposited along the banks and lodged against obstructions in the stream would become impregnated with the putrescible and fermentable matter and when exposed to the sun's heat would putrefy, and in addition to its offensive and deleterious odors would promote the growth of a water moss which fed upon it, and which, when becoming detached, floated down the stream, gathered and accumulated in large quantities upon obstructions in the stream, upon the banks, and in quiet pools in the stream, and there decayed, breeding large numbers of maggots and other vermin, and became itself a source of other noxious and offensive odors on the lands of the appellees and many others; that at times the fish in the stream were killed by said waste matter and floated and collected against obstructions and there putrefied and gave off other noxious and offensive odors; that at times the water of the stream would overflow appellees' said lands and deposit

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thereon and upon the grass the sediment carried in solution and suspension, whereby the grass was killed; that the waste water thus discharged by appellant into the stream was about equal in volume to that flowing in the stream at an ordinary stage of water in the months of July and August; that Greenfield is a city of 6,500 inhabitants, and the sewage from a general system of sewers in the city was turned into the stream in 1895, three miles above appellees' farm, since which time said noxious and offensive odors and conditions have continued with increased intensity to the commencement of this suit; that the pollution of said water by natural causes and by the said sewage was of itself sufficient to render said water unfit for domestic use or for animals to drink, but not to cause the vile odors and stench above stated; that said vile odors extended a distance of eighty rods from the stream; that in hot weather said odors were so strong, offensive, and unwholesome as to require the plaintiffs to keep the windows and doors of their dwellings closed to exclude them, greatly to the discomfort of themselves and families; that if the said pollution of the stream by appellant shall be permitted, it will lessen the value of appellees' farm \$5 to \$10 per acre; that by reason of the pollution of said water by the appellant, the rental value of appellees' farm has been decreased, in the period prior to the commencement of this suit, the sum of \$250, and the appellees have been damaged thereby \$250; that at the commencement of this suit appellant was discharging substantially all of said corruptible matter into said stream, and was then proposing and asserting its ~~right to continue~~ to do so; that appellant since 1898, by the use of purifying devices, has diminished the amount of deleterious matter discharged into the stream and has lessened the odors therefrom, but still continues and will still continue to discharge therein such quantities of said waste matter as will materially increase the ~~pollution~~ of said stream and cause the accumulation of putrescible matter and the emanation therefrom of

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strong, offensive, and noxious odors, to the injury of the plaintiffs; that said odors injuriously and materially affect the citizens and owners and occupants of lands along said stream, including the appellees, and materially lessen their comfort and happiness, and affect the appellees in a manner peculiar to themselves and different from the general public; that said conditions constitute a nuisance and the damages are immeasurable by a pecuniary standard; that appellant, in the construction of its plant in 1893, expended \$90,000 in permanent structures, and, before beginning the construction and during its progress, appellees had knowledge that appellant proposed to expend a large sum of money in the erection and fitting of its mill and that it proposed to manufacture paper from straw, but appellees made no objection to such structures and contemplated business, and donated a quantity of straw to appellant to induce such location and business; but appellees were not informed and did not know or believe that the business would pollute the waters of the stream; that appellant operates its mill in a careful and skilful manner, and that use of said stream as an outlet for part of the waste water is a necessary use of said stream, and conducted in a skilful manner, and the consequent pollution of the stream is without malice or desire to injure the plaintiffs or other persons; but it is reasonably practicable for appellant to still further largely reduce the amount of deleterious matter carried into the stream; that to deprive appellant altogether from the use of said stream for drainage from its mill would compel appellant to abandon the business of paper making and thus render its plant of but little value; that the defendant owns no land bordering on said stream; that its factory and land is situate a short distance away and its said waste water is discharged into said stream through pipes laid across lands leased for that purpose.

The foregoing is in substance the facts specially found, and upon which the court concluded the law to be:

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(1) That the plaintiff should recover from the defendant \$250 as damages up to the commencement of this action, together with costs herein expended; and (2) that the defendant should be enjoined from discharging into Brandywine creek the putrescible and fermentable or otherwise deleterious waste from its said strawboard works at Greenfield in such quantities as to have any material deleterious effect upon the waters of said stream."

The errors assigned and not waived by failure to present them arise upon appellant's exceptions to the conclusions of law and the overruling of its motion for a new trial.

In the discussion it is not denied that the defendant's pollution of the waters of Brandywine creek has injured the plaintiffs in the enjoyment of their homes and property, but it is denied that the plaintiffs are entitled to injunction, or to damages for such injuries, however actual and substantial, for the reason that the defendant's straw-paper making is a lawful business, conducted skilfully and without negligence or malice, and a discharge of its waste into Brandywine creek—the only practicable natural drainage—is absolutely necessary to the operation of the mill.

It is urged that such use of the stream, under like circumstances, is the lawful right of the superior proprietor and that detriment to the lower lands from the incidental corruption of the waters of the stream, is *damnum absque injuria*. We think it is universally held that land on a lower level owes a natural servitude to that on a higher level in respect to receiving the waters that naturally flow down to it in such state of increased impurity as is imposed by upper inhabitants from the ordinary use of their lands for domestic purposes. Every owner is entitled to the free use and enjoyment of his property within reasonable bounds. He may do by his own land, in its use and development, as he pleases, and is not answerable for the elements and forces of nature that may by natural processes affect an inferior estate. And he is not confined to the sur-

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face. He may, with a careful regard for the rights of his neighbors, develop and utilize the natural resources of his land. He may sink deep wells and bring subterranean mineral water to the surface and, having used the water for baths in a sanitarium, may discharge it where by natural flowage it will find its way to lower lands; and there is no liability, as in *Barnard v. Sherley*, 135 Ind. 547, 24 L. R. A. 568, 41 Am. St. 454. Or he may excavate for coal and, if water is encountered, it may, whether pure or impure, be raised and discharged, in its natural state, upon the surface where by gravitation it will find its way into a pure stream, rendering the waters thereof wholly unfit for domestic purposes; and there can be no redress, as in *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 6 Atl. 453. The same rule recognizes the right of cities located upon the banks of a stream to discharge therein the city sewage, to the defilement of the water, when such discharge is necessary as the only practicable means of dispatching the sewage. *City of Richmond v. Test*, 18 Ind. App. 482; *City of Valparaiso v. Hagen*, 153 Ind. 337.

The principle underlying this class of cases is that the public has a general interest in the business carried on, as in being cured of disease by mineral water baths, and in procuring coal for fuel, and in promoting city sanitation; and since the business is of a character that it can not be conducted at any other place than where nature has located it, or where public necessity requires it to be, individual rights must yield to the public good.

The principle of these cases, however, is not applicable to the case before us. Here appellant is not engaged in the development of any natural resource or in any usual or ordinary use of its own land. Its sole business is the manufacture of articles of commerce for its own profit. It is engaged in a business that may be carried on elsewhere less injuriously to the rights of others. It is engaged in bringing to its mill, not from its own premises but from else-

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where, materials from which by artificial means it evolves putrescent matter which it casts into Brandywine creek, to the serious and substantial injury of lower proprietors. This, appellant has no right to do. ✕

No court, so far as we have observed, has gone so far as to recognize the right of a manufacturer to establish his plant upon the banks of a non-navigable stream and pollute its waters by a business wholly brought to the place, entirely disconnected with any use of the land itself, and which he may just as well conduct elsewhere, without responding in damages to those injured thereby and to injunction if the injury done is substantial and continuing. See *Indianapolis Water Co. v. American, etc., Co.*, 53 Fed. 970; *Robb v. Carnegie*, 145 Pa. St. 324, 14 Atl. 329, 22 Atl. 649; *Lentz v. Carnegie*, 145 Pa. St. 612, 23 Atl. 219; *Baltimore, etc., Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. ed. 739; *Barton v. Union Cattle Co.*, 28 Neb. 350, 44 N. W. 454, 7 L. R. A. 457; *Mississippi Mills Co. v. Smith*, 69 Miss. 299, 11 South. 26, 30 Am. St. 546.

[The fact that appellant has expended a large sum of money in the construction of its plant and that it conducts its business in a careful manner and without malice can make no difference in its rights to the stream.] [Before locating the plant the owners were bound to know that every riparian proprietor is entitled to have the waters of the stream that washes his land come to it without obstruction, diversion, or corruption, subject only to the reasonable use of the water, by those similarly entitled, for such domestic purposes as are inseparable from and necessary for the free use of their land; and they were bound also to know the character of their proposed business, and to take notice of the size, course, and capacity of the stream, and to determine for themselves and at their own peril whether they should be able to conduct their business upon a stream of the size and character of Brandywine creek without injury

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make available as a defense in such proceedings. *Palmer v. Hayes*, 93 Ind. 189; *Martin v. Orr*, 96 Ind. 27; *Board, etc., v. Dickinson*, 153 Ind. 682.

And for the same reason he should not be permitted to enjoin a threatened irregular and illegal step in the procedure of municipal improvement when there exists under the law regulating such procedure a right to have such irregularity corrected and rendered harmless.

Sections three, five, six, and seven of the Barrett law must be construed together, and so construed they give to the abutter an opportunity to be heard before a tribunal empowered, and duty bound, to adjust all questioned assessments to the basis of actual special benefits received by the improvement. See *Adams v. City of Shelbyville, supra*.

If appellant avails herself of this remedy she may avoid injury even though the primary allotment of the cost by the city engineer is placed at a sum greater than her benefits, and it is firmly settled in jurisprudence that where a party has a clear and adequate remedy at law he is denied the extraordinary remedy of injunction. *Ploughe v. Boyer*, 38 Ind. 113, 115; *Caskey v. City of Greensburg*, 78 Ind. 233, 238; *Smith v. Goodnight*, 121 Ind. 312, 315; *Martin v. Murphy*, 129 Ind. 464, 467.

In *McKee v. Town of Pendleton*, 154 Ind. 652, it was held that a complaint averring like acts and like intentions by town officers was sufficient to sustain injunction, but it should be noted that in the McKee case there was no averment that the officers had proceeded and would accomplish the improvement under the provisions of any law of this State, and that decision rests upon this ground.

The demurrer to the complaint was properly sustained. Judgment affirmed.

DISSENTING OPINION.

BAKER, C. J.—I dissent. In the cases of *Adams v. City of Shelbyville*, 154 Ind. 467, and *City of Indianapolis v. Holt, ante*, 222, I have fully expressed my views regarding

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the constitutionality of the street improvement laws of this State. I do not deem it needful to add anything to those views. But I desire to note the contrast between the present decision and that of *McKee v. Town of Pendleton*, 154 Ind. 652. In that case the town was threatening to construct a street improvement and collect the cost from the abutters by frontage. It was held that the complaint stated a good cause of action for injunction. In this case the complaint charges that the city is threatening to construct a street improvement and collect the cost from the abutters by frontage,—and further shows that the city claims that such procedure is authorized by the Barrett law. The city's demurrer to the complaint admitted the facts to be true that were well pleaded, and this includes the averments of intent. The plaintiff was bound by the statement of facts in her complaint, but not by her statement of her adversary's conclusions of law. The present decision holds an ordinance to be legal in which the city has determined upon an illegal method. Under the *McKee* case, *supra*, I think the ordinance of the city of Crawfordsville should be held unlawful. How can this court decide as a matter of law that the city will hereafter abandon its unlawful intent, admitted as a question of fact? Is it the presumption that the city, like the king, can do no wrong?

TACKETT ET AL. v. STEVENSON.

[No. 18,961. Filed November 13, 1900.]

INJUNCTION.—*Legal Remedy.*—*Counties.*—*Contracts of Employment.*
—*Accounts.*—An action by a taxpayer will not lie to enjoin the county commissioners from entering into a contract employing a person to prepare an index to certain county records, since §7853 Burns 1894, provides an adequate legal remedy.

From the Decatur Circuit Court. *Reversed.*

Cortez Ewing and *Davison Wilson*, for appellants.

Hugh Wickens and *J. E. Osborn*, for appellee.

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166 330

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BAKER, C. J.—Appellee, as a taxpayer of Decatur county, began this suit to annul, and to enjoin appellants from executing, a contract whereby the board of commissioners of Decatur county employed appellant Tackett to prepare a general index of certain records in the office of the clerk of the Decatur Circuit Court. The error assigned is the overruling of a demurrer to the complaint.

The commissioners were acting, or at least assuming to act, under §7853 Burns 1894, §5766 R. S. 1881 and Horner 1897. That section would require appellant Tackett to file his account with the board at least ten days before the beginning of the term at which he expected to demand pay for his services, and would afford appellee or any other taxpayer of the county the right to contest the claim before the board; and the statute providing for appeals from decisions of the board would furnish appellee, if unsuccessful before the board, an opportunity to be heard fully in the circuit court. Inasmuch as a plain and adequate legal remedy is provided by statute, that remedy must be pursued and injunction will not lie. *Board, etc., v. Dickinson*, 153 Ind. 682.

Judgment reversed, with directions to sustain the demurrer to the complaint.

WEBBER v. HARDING.

[No. 19,507. Filed November 13, 1900.]

APPEAL AND ERROR.—*Motions.*—*Record.*—Where motions to strike out pleadings or exhibits are not made part of the record by bill of exceptions or by order of court they cannot be considered on appeal. p. 411.

CRIMINAL LAW.—*Indictment.*—*Justices of the Peace.*—*Police Judge.*—In a criminal prosecution begun before a justice of the peace or police judge it is not necessary that the charge be made by indictment or information, but the same may be made by complaint under oath under the provisions of §1694 Burns 1894. p. 412.

SAME.—*Prostitution.*—*Judgments.*—*Police Judge.*—A judgment rendered by a police judge, finding defendant guilty of prostitution and fixing her punishment at a fine of \$5 and imprisonment in the

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county workhouse for twenty days and that she stand committed to the workhouse until such fine should be paid or replevied, was sufficiently certain, and was within the power and jurisdiction of such court under the provisions of §887 *et seq.* Burns 1894. pp. 412, 413.

CRIMINAL LAW.—*Prostitution.—Constitutional Law.*—Section 2090 Burns 1894, prohibiting females from living in and frequenting houses of ill fame is not unconstitutional as being an invasion of personal liberty. p. 413.

SAME.—*Mittimus.—Seal.*—The omission of the seal of the court from a mittimus is a mere irregularity, and does not render the mittimus void. p. 413.

SAME.—*Habeas Corpus.*—A mittimus issued pursuant to a judgment rendered by a police judge in a case in which he had jurisdiction of the subject-matter of the action and of the person of the defendant cannot be inquired into by a writ of *habeas corpus*. p. 413.

From the Marion Superior Court. *Affirmed.*

Henry W. Bullock, for appellant.

Taylor E. Groninger, for appellee.

DOWLING, J.—This is a proceeding upon a writ of *habeas corpus* to obtain the discharge of the appellant from imprisonment in the Marion county workhouse. The petition charges that the appellant is restrained of her liberty by the appellee in said workhouse, by virtue of an alleged mittimus. It avers that the imprisonment of the appellant is illegal for the following reasons: (1) She was never lawfully tried, convicted, or sentenced by any court having jurisdiction over her; (2) no indictment or presentment was ever found against her by a grand jury, nor was an information filed against her; (3) no trial was had in her presence, nor was any judgment pronounced or entered in her presence; (4) no judgment of any kind was rendered before the mittimus was issued; (5) the term for which she was committed was uncertain, and exceeded the authority of the court which tried her; (6) there was no judgment defining the crime of which she was found guilty; (7) no warrant for her arrest was issued to, or served by, the proper officer; (8) the supposed judgment against the appellant, and the mittimus issued thereon, are insufficient,

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in form and substance, because of their failure to state the offense; and (9) no judgment was rendered against her, nor was any writ lawfully issued for her commitment to the workhouse.

The court awarded the writ, and the appellee made his return thereto under oath. The return alleged that the appellant had been properly charged upon affidavit, before the police judge of the city of Indianapolis, in the county of Marion and State of Indiana, with living in, and frequenting a house of ill fame, in the said city of Indianapolis; that the cause came on for trial before said police judge October 16, 1900; that the appellant was, by the judgment of the said police judge duly given, convicted of said offense, and fined \$5 with costs, and that it was further adjudged that she be confined in said workhouse until said fine and costs be paid or replevied; that the appellant failed to replevy such costs; and that said police judge, by his writ of mittimus, committed the appellant to the Marion county workhouse. Copies of the affidavit, warrant, docket entry, judgment, and mittimus are filed with, and made parts of, the return.

The affidavit, a copy of which was so filed as an exhibit, charged the appellant with living in and frequenting a house of ill fame (giving its location by street and number) in the said city of Indianapolis. The docket entry and judgment were in these words: "State of Indiana v. Emma Webber. No. 82. On the 16th day of October, 190-, came John Shine, and filed an affidavit charging the defendant with the misdemeanor of prostitute, upon which a warrant was issued and delivered to the superintendent of the Indianapolis police force, of the city of Indianapolis, for the arrest of the defendant, and the said superintendent now returns the same served, by bringing the defendant into court; and the defendant, having been arraigned, for plea says she is guilty as charged in said affidavit; and a trial having been had, the evidence heard,

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and the court fully advised in the premises, it is now considered and adjudged by the court that the defendant—guilty as charged in said affidavit, and for her punishment the court does assess that the said defendant be imprisoned in the workhouse of Marion county for twenty days; and that she make her fine to the State of Indiana in the sum of \$5, and that she pay the costs of the prosecution taxed at \$10, and that the defendant stand committed in the workhouse of Marion county until said fine shall be paid or replevied. Trial and judgment rendered Oct. 16, 1900.” The mittimus is regular in form, and follows the judgment.

The appellant moved to strike out the copies of the affidavit, warrant, and judgment, for the reason that they did not correspond with the affidavit, warrant, and judgment mentioned in the return, and for the further reason that the copy of the judgment set out is different from the judgment referred to in the mittimus. This motion was overruled. The appellant then excepted to the sufficiency of the return upon various grounds. All of these exceptions were overruled, and, the appellant electing to stand upon them, and refusing to plead further, judgment was rendered against her.

The errors assigned are the rulings of the court on the motion to strike out the exhibits filed with the return, and on the exceptions to the sufficiency of the return.

Motions to strike out pleadings, exhibits, and the like, must be brought into the record by bill of exceptions, or be made a part of the record by the order of the court. The first error assigned cannot be considered for the reason that it is not properly presented by bill of exceptions, or by such order. *Balue v. Richardson*, 124 Ind. 480; *Dudley v. Pigg*, 149 Ind. 363, 368, 369; *Elliott's App. Proc.* §190; *Ewbank's Manual*, §26.

The exceptions to the sufficiency of the return were, we think, properly overruled. While the return of the appel-

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lee to the writ, and the exhibits filed with it, contain many slight defects and irregularities, they set forth enough to show that the appellant was lawfully restrained of her liberty, and that she was not entitled to be discharged from the custody of the appellee, as the superintendent of the Marion county workhouse. It appears from the judgment that the appellant was present in person in the police court, that she made no objection to the warrant of arrest, that she pleaded guilty to the charge against her, that she was thereupon adjudged guilty, that her punishment was fixed at twenty days' imprisonment in the Marion county workhouse, that she pay a fine of \$5, and the costs of the action taxed at \$10, and that she stand committed until the fine be paid. The discrepancies between the return and the exhibits filed with it constituted no ground for setting aside the return. The appellant was properly charged on complaint, under oath, with the misdemeanor of living in and visiting houses of ill fame. It was not necessary that the charge should be made by indictment or information. §§1694, 1695, 1697, 2090 Burns 1894; 1 Bishop's Crim. Proc. (3rd ed.), §§149, 152, 153, 174, 175, 176; 2 Hawkins' Pleas of the Crown, Ch. 8, §63; 12 Am. & Eng. Ency. of Law (1st ed.), §406, and note 4; 2 Chitty's Gen. Prac. 155.

The police judge had jurisdiction of the offense with which the appellant was charged. §3889 Burns Supp.

In the trial of any person in the police court for the violation of a law of this State, the court has the power to assess a fine in any sum not exceeding \$500, or to adjudge imprisonment as a part of the sentence for any time not exceeding six months in the county jail, or workhouse. §3890 Burns 1894.

County boards are authorized to establish workhouses, and any person convicted of an offense punishable by confinement in the county jail may be sentenced to the workhouse instead. §§8330, 8332 Burns 1894.

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The commitment in this case was for twenty days, and until the fine of \$5 should be paid or replevied. This was sufficiently certain, and was within the power and jurisdiction of the police judge as conferred by the statute.

The objections urged against the constitutionality of the statute prohibiting females from living in and frequenting houses of ill fame, on the ground that it is an unwarranted invasion of the personal liberty of the citizen, are entirely without merit.

It appears from an inspection of the record that the appellant was confined in the workhouse of Marion county, of which the appellee was superintendent, by virtue of a mittimus issued by the police judge of the city of Indianapolis. The omission of the seal of the court was a mere irregularity and did not render the mittimus void. *Hunter v. Burnsville, etc., Co.*, 56 Ind. 213; *Mountjoy v. State*, 78 Ind. 172; *Qualter v. State*, 120 Ind. 92; *Warmoth v. Dryden*, 125 Ind. 355.

The mittimus was issued pursuant to a judgment rendered by the police judge in a case in which he had jurisdiction of the subject-matter of the action, and of the person of the defendant. The jurisdiction of the court, therefore, was competent, and its judgment final. Under these circumstances, no inquiry can be made into the legality of the judgment, or process whereby the appellant is in custody, nor can she be discharged before the term of her commitment has expired. §1133 Burns 1894; *Willis v. Bayles*, 105 Ind. 363; *McLaughlin v. Etchison*, 127 Ind. 474, 22 Am. St. 658. We find no error in the record. Judgment affirmed.

State, *ex rel.*, v. Indiana Board of Pharmacy.

155	414
157	451
157	528

155	414
158	98

155	414
167	381

THE STATE, EX REL. RHODES, v. THE INDIANA BOARD OF PHARMACY.

[No. 19,426. Filed November 15, 1900.]

APPEAL AND ERROR.—*Mandamus.—Alternative Writ.*—A judgment on demurrer to an alternative writ of mandate will not be reversed on appeal because the demurrer was addressed to the alternative writ instead of the writ and petition, unless the facts exhibited in the petition and alternative writ entitled the relator to the relief sought. *pp. 414, 415.*

DRUGGISTS.—*Licenses.—State Board of Pharmacy.—Mandamus.*—An action in mandamus will not lie to compel the board of pharmacy to issue an applicant a license without examination or diploma, under the provision of the pharmacy act of 1899 (Acts 1899, p. 159), requiring such board to issue a license to any person who at the time of the taking effect of the act was the proprietor or manager of a store or pharmacy in which physicians' prescriptions were compounded, where the petition showed that the relator became the owner of the pharmacy on June 19, 1899, since such act took effect April 27, 1899. *pp. 415-417.*

From the Marion Superior Court. *Affirmed.*

Ignatius Brown, I. M. Holmes and L. M. Brown, for appellant.

W. L. Taylor, Attorney-General, *Merrill Moores* and *C. C. Hadley*, for appellee.

BAKER, C. J.—On relator's petition an alternative writ of mandate was issued to compel appellee to grant relator a license as a registered pharmacist under the act of March 1, 1899 (Acts 1899, p. 159). Appellee's demurrer to the alternative writ was sustained. On relator's refusal to plead further final judgment was rendered. Sustaining the demurrer to the writ is assigned as error.

Relator first insists upon a reversal because the demurrer was addressed to the alternative writ and not to the writ and petition. Even if relator were correct in urging that the demurrer presented no question, the judgment would not be reversed unless the facts exhibited in the petition and

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alternative writ entitled relator to the relief sought. *Garrett v. Bissell Chilled Plow Works*, 154 Ind. 319.

Relator next contends that the facts required the court to order the issuance of a license to him. It is averred that on June 19, 1899, relator was over eighteen years of age and was the proprietor of a pharmacy in which physicians' prescriptions were compounded and sold; that on June 22, 1899, relator applied to appellee for a license as a registered pharmacist; that his application was made under the first qualification in section three of the pharmacy act which became a law by its terms on July 1, 1899; that he paid the fee prescribed in the act and demanded a license; and that appellee has failed and refused to issue him a license.

The first section of the act directs "That on the taking effect of this act the Governor of Indiana shall appoint five pharmacists * * * who shall constitute a board to be styled the Indiana Board of Pharmacy". The second section provides for the organization and meetings of the board. The third section, to the end of the first qualification, reads: "Upon the payment of such fee or fees as hereinafter provided, said board shall grant and issue a license as registered pharmacist, or as registered assistant pharmacist, to any person not less than eighteen years of age, as hereinafter provided, for two years or the unexpired portion thereof prior to the next regular date of re-registration, upon producing evidence satisfactory to said board of one of the following qualifications, to wit: For registered pharmacist. First. He shall, at the time of the taking effect of this act, be the proprietor or manager of a store or pharmacy in which physicians' prescriptions are compounded." The fourth, fifth, sixth and seventh sections relate to the fees to be paid by applicants for license, rules and regulations, and compensation of members of the board. The eighth section declares that "On and after July 1, 1899, it shall be unlawful for any person to con-

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duct a store or pharmacy in which" etc., "unless there be in charge a registered pharmacist, or a registered assistant pharmacist, under the provisions of this act." The ninth and last section fixes the penalties for violations of section eight.

Article 4, §28, of the Constitution: "No act shall take effect until the same shall have been published and circulated in the several counties of this State by authority, except in case of emergency; which emergency shall be declared in the preamble or in the body of the law." Sections 238, 239 Burns 1894, §§238, 239 R. S. 1881 and Horner 1897: "It shall be the duty of the several clerks of circuit courts in this State, immediately on the receipt of the laws of any session, to transmit to the Governor a certificate stating the day when such laws are so received. So soon as certificates from all the counties have been received, the Governor shall issue and publish his proclamation, announcing the date at which the latest filing took place; of the facts contained in which proclamation all courts shall take notice." The pharmacy act did not contain an emergency clause. The Governor's proclamation, issued and published on April 27, 1899, announced that the latest filing occurred on April 27, 1899. Therefore, the law took effect on April 27, 1899, unless the act itself fixes a later date for that event. Under relator's petition and the alternative writ, showing that relator became the owner of a pharmacy on June 19, 1899, relator was not entitled to a license without examination or diploma, unless he was such owner before the law took effect. Relator contends that section eight fixes the date at July 1, 1899. This section merely provides that on and after July 1st it shall be unlawful to conduct a pharmacy without a license. One would naturally expect that, in view of section eight, the other parts of the act would afford pharmacists opportunity to put their businesses on a lawful basis by July 1st. And such is found to be the case. Section three contains this

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provision: "All persons desiring registration without examination shall make application to the board prior to July 1, 1899." Section one directs the Governor to appoint the board "on the taking effect of this act". Section two allows fifteen days after appointment for the organization of the board. The contention that the board could not be appointed until July 1st and might take to July 15th to organize is inconsistent with the provisions requiring applications like the relator's to be filed with the board before July 1st and making it unlawful to conduct a pharmacy without a license on and after July 1st. The act took effect on April 27, 1899.

Judgment affirmed.

GASCHO ET AL. v. SOHL ET AL.

[No. 18,848. Filed November 20, 1900.]

155	417
158	167

HIGHWAYS.—Establishment.—When Partially Within City Limits.—

Where, in a proceeding to establish a highway, before the act of 1899 (Acts 1899, p. 116) came into effect, it appeared that a part of the proposed highway lay within the corporate limits of a city, the court, on appeal from the board of commissioners establishing the highway, erred in overruling a motion to dismiss the petition, since the board had no jurisdiction of that part of the proposed highway within the city limits.

From the Hamilton Circuit Court. *Reversed.*

F. E. Gavin, T. P. Davis and J. L. Gavin, for appellants.
J. A. Roberts and Meade Vestal, for appellees.

BAKER, C. J.—On September 8, 1897, under §§6742-6753 Burns 1894, §§5015-5026 R. S. 1881 and Horner 1897, appellees filed a petition with the board of commissioners of Hamilton county for the location of a highway on the half-section line running north and south through a certain section. The north thirty rods of the proposed line forms a part of the east boundary of the city of Nobles-

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ville, so that the west half of a considerable part of the proposed road lies within the city limits. Lands of the appellants will be taken by the opening of the road. Viewers were appointed, and they found the proposed highway to be of public utility and laid out the same thirty feet in width upon the line described in the petition. In response to the notice appellants appeared, and at their first appearance filed a verified motion to dismiss the petition on the ground that a portion of the highway lay within the corporate limits of the city. The board overruled the motion. Appellants then filed remonstrances for damages. Reviewers reported against the remonstrants, and thereupon the board entered a judgment establishing the road and ordering it to be opened and kept in repair. On appeal to the Hamilton Circuit Court appellants renewed their motion to dismiss. Appellees filed a verified showing in opposition to the motion, in which they stated (1) that appellants are not residents of Noblesville and their lands do not border upon that part of the proposed road located within the corporate limits, and (2) that a petition signed by several residents of Noblesville has been filed with the common council of the city praying for the location and opening of a street upon the part of the proposed road that lies within the city, and that the council has referred the petition to the committee on streets and alleys. Acting on the verified motion and counter-showing, the court overruled the motion. The motion, the counter-showing, the court's ruling and appellants' exceptions thereto are properly embodied in a bill of exceptions. A trial was then had before a jury, who returned a verdict in favor of the public utility of the proposed road and against appellants' claims for damages. Over appellants' motion for a new trial, the court entered judgment on the verdict. Appellants assign as error the overruling of their motion to dismiss and their motion for a new trial.

In 1895 (Acts 1895, p. 14), the legislature amended

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section sixteen of the highway law, §6743 Burns 1894, §5016 R. S. 1881 and Horner 1897, by adding the following proviso: "And provided further, that whenever the location of a highway is petitioned for upon and along any section line, which forms also the boundary or corporate limits of any incorporated city or town, the county commissioners shall, for the purpose of locating such highway, have jurisdiction over the lands and lots lying within such corporate limits and immediately affected by such proceedings and location; and the owners of such lands and lots so affected shall have the same rights and remedies in the matter of the locating of such highway as the owners of the lands lying on the opposite side of such highway and outside of said incorporated city or town." In 1899 (Acts 1899, p. 116) the foregoing proviso was amended so as to give the commissioners jurisdiction "whenever the location of a highway is petitioned for upon and along any line, which forms also the boundary or corporate limits of any incorporated city or town." These statutes but emphasize the fact that the city's original exclusive jurisdiction over its own territory, conferred by the legislature, can be taken away only by the legislature. *State v. Chicago, etc., R. Co.*, 151 Ind. 474; *Town of New Castle v. Lake Erie, etc., R. Co.*, ante, 18. Prior to 1895 the location of a highway wholly in the country lay within the exclusive jurisdiction of the commissioners, and of a highway wholly in the city within the exclusive jurisdiction of the council. At that time no provision had been made by the legislature whereby the commissioners alone or the council alone or the two jointly were authorized to take jurisdiction of one highway as an entirety which lay partly in the country and partly in the city. When this new subject-matter was provided for, it was for the legislature to place jurisdiction where it saw fit. *Anderson v. Endicutt*, 101 Ind. 539; *Sauntman v. Maxwell*, 154 Ind. 114, 120. The petition in this case does not come

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within the act of 1895, because the proposed road is not on a section line; nor within the act of 1899, because this proceeding had been begun and disposed of before that act came into effect.

The proposed highway is an entirety and was established as such. The judgment appealed from is an entirety and must be treated as such. The highway established must be of the general character of the highway petitioned for. "The order for the location of the highway must be for such a way as the one described in the petition." *Lowe v. Brannan*, 105 Ind. 247, 249, citing *People v. Township Board*, 12 Mich. 434; *Brannan v. Mechlenburg*, 49 Cal. 672; *Damrell v. Board*, 40 Cal. 154; *Robinson v. Logan*, 31 Ohio St. 466. "The road was an entirety. As such it was petitioned for, and as such the court attempted to establish it. No one contemplated that a part at each end was to be established, while an essential link necessary to connect those parts was wanting. Without attempting to demonstrate that a result could not properly be held to have been reached which was not contemplated by any one, it is sufficient to say that, in this case, the court, as it appears to us, did not acquire jurisdiction." *Barnes v. Fox*, 61 Iowa 18, 15 N. W. 581. "The proceeding for laying out the whole road must be regarded as an entirety. Among the purposes for which the road was attempted to be established, as may be supposed, was the affording of a way for travel over the whole line, from the place of beginning to the road which was referred to as the southern terminus. We cannot assume that a highway over a part of the line would be of any public or even private utility, or that the supervisors would have laid out any road if they had not supposed that they were effectually laying out the whole." *Sonnek v. Town of Minnesota Lake*, 50 Minn. 558, 52 N. W. 961. "These powers [of cities over the subject of highways within the corporate limits] are exclusive; and the doctrine is that statutes conferring in general terms au-

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thority upon commissioners of highways to lay out, open, maintain or vacate roads, do not give an authority that can be exercised within the territorial limits of cities and villages, although located within the towns [townships] for which such commissioners of highways are elected. * * * These commissioners of highways, then, had no jurisdiction whatever in regard to highways or roads within the incorporated city of Minonk, and when they assumed to lay out and open a public road sixty feet wide * * * and located thirty feet in width of said road * * * within the territorial limits of the city, their action, at least in respect to said thirty feet, was manifestly null and void and of no effect whatever." *Shields v. Ross*, 158 Ill. 214, 41 N. E. 985.

Appellants are not residents of Noblesville and their lands lie outside the city. But part of their land is taken by the proposed road described in the petition. They were entitled to compensation if their damages exceeded their benefits. The reviewers and the jury found that their damages would not exceed the benefits resulting from the establishment of the road described in the petition. The judgment appealed from, therefore, determines that appellants, by the surrender of their land for the road, paid for an interest in the road as an entirety. Since a part of the consideration fails, the judgment, which is an entirety, can not be upheld.

Appellees cite the cases of *Sparling v. Dwenger*, 60 Ind. 72, and *Chicago, etc., R. Co. v. Sutton*, 130 Ind. 405. In each of these cases a landowner sought to enjoin a road supervisor from entering upon plaintiff's land to open a road under a judgment of the county commissioners establishing the road. The road as established was partly in the country and partly in the city. Plaintiff's land was wholly in the country and not contiguous to the city. Plaintiff was legally notified of the pendency of the proceeding, and failed to appear and object or ask for damages. It was

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held, in substance, that plaintiff had a complete and adequate remedy at law in the proceeding before the commissioners and by appeal; that plaintiff sought only to exclude the supervisor from his land, and did not show that his situation was at all different from what it would have been if the road had been established wholly in the country; and that, therefore, injunction would not lie. These cases, whether rightly or wrongly decided, are not in point here, because appellants are pursuing their plain and adequate remedy of appeal.

Judgment reversed, with directions to sustain the motion to dismiss.

SHERRIN ET AL. v. FLINN.

[No. 18,850. Filed November 21, 1900.]

155 422
162 533

CANCELATION OF INSTRUMENTS.—*Fraud.—Deeds.—Quieting Title.*—

A complaint to obtain the cancelation of a deed executed by plaintiff, and to quiet his title to the land described, alleged that plaintiff, who was old and infirm, conveyed his farm, of the value of \$6,000, to his daughter and her husband in consideration of their oral promise to give him a home with them on the land so long as he should live, and to support, provide for, nurse, and take care of him when sick, and for the further consideration that the grantees should execute to him their promissory notes for \$1,000 with interest, payable at such time as should be agreed upon; that after the execution of the deed the grantees failed to provide him with a home, and refused to execute their notes as agreed. *Held*, that the facts averred showed fraud and were sufficient to entitle plaintiff to a judgment canceling the deed and quieting his title to the land. pp. 423-428.

QUIETING TITLE.—*Damages.—Complaint.*—The fact that damages were claimed for the use of the land, and on account of the cutting and removal of the timber therefrom, did not render an action to set aside a deed of conveyance to the land and quiet the title there to any less an action to quiet title. p. 428.

From the Grant Circuit Court. *Affirmed.*

Austin De Wolf, G. A. Henry and P. H. Elliott, for appellants.

A. E. Steele, W. S. Marshall and J. A. Kersey, for appellee.

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DOWLING, J.—Suit by the appellee against the appellants to obtain the cancelation of a deed executed by appellee, and to quiet his title to the land therein described. Complaint in two paragraphs. The material allegations of the first paragraph are that the appellee was the owner in fee simple of the two tracts of land described in the complaint, situated in Grant county, Indiana, of the value of \$6,000; that the appellant, Huldah M. Sherrin, is the daughter of the appellee, and that her codefendant, Levi, is her husband; that the appellants, having first acquired the confidence of the appellee by simulated kindness to him, for the purpose of cheating and defrauding him, and depriving him of his said land, and aided by the father of the appellant Levi, who was a trusted friend of the appellee, persuaded the appellee to convey his said lands to the appellants, jointly, by warranty deed, in consideration of their oral promise to give him a home with them on said lands so long as he should live, and to support, provide for, nurse, and take care of him when sick, and for the further consideration that appellants should execute to the appellee their promissory notes for \$1,000, bearing interest at the rate of six per centum per annum, and payable thereafter at such time as should be agreed upon; that at the time of such persuasion appellee was growing old, he was in feeble health, he was easily influenced by the appellants, he confided in their honesty and affection, and he fully relied upon their said promises. In this confidence and belief, and without any other consideration than the promises aforesaid, he executed to the appellants, jointly, a deed of conveyance of and for his said lands, and put them in possession thereof; that when said promises were so made, the appellants had no intention of performing them, and made the same fraudulently, solely for the purpose of obtaining such conveyance; that immediately after securing said deed, the appellants changed their demeanor toward appellee, and thereafter treated him only with coldness, indifference, and

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neglect in health and sickness; that they failed to provide him with a home as they had agreed to do, and refused to execute their notes for the said sum of \$1,000; that the appellants by their unkindness attempted to drive the appellee from their home on said lands, and when they found they could not succeed by that means they leased said lands to strangers, and moved away therefrom; that appellants have had the possession of said lands ever since the execution of said deed, to wit, from April 5, 1894; that the rents and profits for the time they have held said lands are worth \$1,500, and that they have cut and removed timber from said lands of the value of \$300. It is further averred that, before bringing the action, appellee demanded that appellants carry out their agreement with him, but that they refused to do so, and that he then demanded a reconveyance of the said lands, and the surrender of the possession thereof, which requests, also, were refused; that appellants are entirely insolvent, and have no property subject to execution.

The relief demanded is that the deed executed by appellee be decreed void, that appellants be required to reconvey said lands to appellee, and upon their failure to do so that such conveyance be made by a commissioner of the court, that appellee's title to said lands be quieted as against the appellants, that he have judgment for \$2,000 damages, and other proper relief.

The second paragraph of the complaint does not differ materially from the first.

Appellants demurred to each of these paragraphs. Their demurrers were overruled, and they filed a joint answer in denial. The cause was tried by the court, and there was a finding and judgment in favor of the appellants. Appellee thereupon filed a motion for a new trial as of right, with the proper undertaking, and this motion was sustained. Appellants moved to set aside the order granting the new trial, and to restore the judgment. Their motion was over-

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ruled, a change of judge was demanded by appellee, and the cause was transferred to the Grant Circuit Court. It was tried by the court, and there was a general finding in favor of the appellee. Judgment was rendered on the finding to the effect that the appellee was the owner in fee simple of the lands in controversy; that his title thereto be quieted; that he recover the possession thereof, and that he recover his costs.

Appellants moved for a new trial on the ground that the finding was not sustained by sufficient evidence, and that it was contrary to law. Motion overruled. Exceptions to the rulings of the court were properly reserved by appellants.

Error is assigned upon the decisions of the court on the demurrers to each paragraph of the complaint; in granting a new trial to appellee as of right; in refusing to vacate the order granting the new trial; and in overruling appellants' motion for a new trial.

The appellee objects to the consideration of the errors assigned because of certain alleged imperfections in the record, but, in view of the subsequent proceedings of the parties, these objections cannot prevail. *Powell v. Bunger*, 91 Ind. 64; *Louisville, etc., R. Co. v. Lockridge*, 93 Ind. 191.

Counsel for appellants insist that neither paragraph of the complaint states a cause of action. They assert that the facts pleaded entitle the appellee neither to a decree quieting his title, nor to a judgment for the recovery of the lands.

It is very clearly shown in each paragraph that the appellee was the owner of the lands in dispute; that the execution of the deed under which the appellants claim title to the land, was obtained by imposition and fraud; that the appellants hold and claim the lands by virtue of that deed; and that the conveyance ought to be set aside. It also appears that the legal title to the land is in the appellants; that the title of the appellee is an equitable one, and that

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the relief to which he was entitled, and which he demanded, was that his title be quieted as against any claim of the appellants. These averments, we think, were sufficient. *Brown v. Ogg*, 85 Ind. 234; *Stockton v. Lockwood*, 82 Ind. 158; *Grissom v. Moore*, 106 Ind. 296, 55 Am. Rep. 742; *Kitts v. Willson*, 106 Ind. 147; *Hall v. Durham*, 109 Ind. 434; *Ikerd v. Beavers*, 106 Ind. 483; *Otis v. Gregory*, 111 Ind. 504; *Anderson v. Anderson*, 128 Ind. 254; *Comegys v. Emerick*, 134 Ind. 148, 39 Am. St. 245.

The facts stated in the complaint make a strong case for the interposition of a court of equity. Transactions of this character, where an aged and infirm parent transfers valuable property to a child, without consideration, or upon a promise of a home and maintenance, are closely scrutinized by the courts, and no tolerance is shown to anything resembling fraud or deceit on the part of the grantee. *Ikerd v. Beavers*, *supra*.

The agreement as described in the complaint was unfair and unconscionable. The deed executed by the appellee was, on its face, absolute and unconditional, and purported to be made in consideration of \$1,000 in money paid to the grantor. The land was alleged to be worth \$6,000. No power of revocation, or covenant for the benefit of the grantor, was contained in the deed. No written evidence of the agreement of the grantees to furnish a home for their aged relative, and to take care of him, was executed. The appellee parted with his lands upon the faith of a mere oral promise of the appellants that they would furnish him a home with them on the lands, that they would take care of him, and that they would pay him \$1,000 with interest. It is charged that they made these promises solely for the purpose of obtaining the deed, and that they never intended to perform any of them. The demurrers admit the truth of these averments.

In view of the relation between the parties, the age and infirmities of the grantor, his dependence upon the appel-

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lants, and the fact that the proposed conveyance of the land was, practically, a gift, the conduct of the appellants constituted a fraud upon the appellee, and he was entitled to a cancelation of the deed, and to a judgment quieting his title to the land.

The doctrine laid down in Cooley on Torts, 603, (2nd ed.) is directly applicable here. That author says: "And if it [equity] can discover that any acts, or stratagems, or any undue means have been used to procure such gifts; if it can see the least speck of imposition, or that the donor is in such situation in respect to the defendant as may naturally give him an undue influence over him; if, in a word, there be the least scintilla of fraud, a court of equity will interfere." *Chambers v. Chambers*, 139 Ind. 111, 115; *Ewing v. Wilson*, 132 Ind. 223, 230, 19 L. R. A. 767; *Basye v. Basye*, 152 Ind. 172.

Each paragraph of the complaint was sufficient, and the demurrers to the same were properly overruled.

The second and third errors assigned question the correctness of the ruling of the trial court in granting to the appellee a new trial as of right, upon the first hearing of the cause. What has already been said is sufficient to dispose of this branch of the appeal. Each paragraph of the complaint was not only good as against a demurrer for want of facts, but was sufficient as a complaint to quiet title.

Warburton v. Crouch, 108 Ind. 83, is in point, and the language used there may aptly be applied here: "This is not an ordinary suit to set aside a fraudulent conveyance, and subject the land to the claims of creditors, but it is a suit to revest title in an owner whose land had been obtained from him by fraud, and subsequently conveyed to a fraudulent grantee. The title to the land was directly in question and was necessarily adjudicated. In truth, the second paragraph of the complaint is nothing more than a claim for the recovery of real estate, specifically set forth. The case is, therefore, fully within the doctrine declared in

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Adams v. Wilson, supra, and a new trial was demandable as of right. *Physio-Medical College v. Wilkinson*, 89 Ind. 23." *Adams v. Wilson*, 60 Ind. 560; *McKittrick v. Glenn*, 116 Ind. 27; *Comegys v. Emerick*, 134 Ind. 148.

The fact that damages were claimed for the use of the land, and on account of the cutting and removal of timber therefrom, did not render the action any less an action to quiet title. "The damages are merely incidental to the principal right." *Bisel v. Tucker*, 121 Ind. 249. Our conclusion is, therefore, that the court did not err in sustaining appellee's motion for a new trial as of right, and in overruling appellants' motion to set aside the order for such new trial, and to restore the judgment.

In the last place, it is contended that the court erred in overruling appellants' motion for a new trial. A careful reading of all the evidence satisfies us that it is sufficient to sustain the finding. It cannot be said that there is a failure of proof upon any material point. The evidence might have been stronger and clearer, but in cases of this class a court of equity does not require a plaintiff to establish his claim beyond doubt. Some evidence in support of every material allegation of the complaint was before the trial court. In a case of this character, the opportunity of seeing the parties, and their witnesses, comparing the parties with respect to intelligence, shrewdness, force of character, and other conditions, is of the highest importance in enabling the court to arrive at a just conclusion as to the merits of the controversy. The trial court possessed this advantage, and, we must presume, availed itself of it in determining the cause. We are not at liberty to weigh the evidence, as the trial court was bound to do, and we cannot say that the decision of that court upon the motion of the appellants for a new trial was erroneous.

No objection to the form and scope of the judgment having been taken below, the appellants are not in a situation to make that objection here. Judgment affirmed.

Coyle, Adm., v. Pittsburgh, etc., R. Co.

COYLE, ADMINISTRATOR, v. PITTSBURGH, CINCINNATI,
CHICAGO AND ST. LOUIS RAILWAY COMPANY.

155	429
157	24

[No. 18,858. Filed November 22, 1900.]

CONTRIBUTORY NEGLIGENCE.—Assumption of Risk.—Damages.—Railroads.—In an action against a railroad company for damages for the death of plaintiff's decedent it was alleged that decedent was a section hand employed by defendant; that it was the custom of defendant to permit all persons hired to work on the road to ride from their work to their residences; that decedent boarded one of defendant's freight trains, which had no caboose or passenger car attached, and took a position on the front platform of the last freight car, and, in passing over a defect in the track, deceased was suddenly jerked and thrown from his footing to the ground and injured, from which injuries he died. *Held*, that the facts pleaded not only show that deceased was guilty of negligence contributing to his injury, but that he assumed the risk.

From the Jefferson Circuit Court. *Affirmed*.*L. V. Cravens, A. D. Vanosdal and Hiram Francisco*, for appellant.*S. Stansifer, M. R. Sulzer and S. J. Bear*, for appellee.

HADLEY, J.—Appellant sued appellee to recover damages for personal injuries alleged to have been sustained by his intestate, Thomas Welch, through the negligence of the appellee. It is alleged in the complaint that the defendant owns and operates a railroad which it had negligently suffered to get and remain out of repair, in manner specifically stated, for the space of ten days prior to the accident, and which defective condition was well known to the defendant, and unknown to the decedent; that Welch had been employed in Madison by the defendant as section hand, and had proceeded to North Madison to work, where he was informed by the section boss that he was not needed; that it had long been the custom of the defendant to permit all persons hired to work on the road to ride from their work at North Madison to their residences in Madison on any

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freight train belonging to the defendant, without special permission or pass, and that said custom was well known to both Welch and the defendant; "that it was the custom, rule, and practice of said company that no caboose or passenger coach of any kind was hauled on said freight trains from North Madison to Madison, but all persons riding on said freight trains were permitted to ride down hill from North Madison to Madison on the freight cars attached to said train; that, relying upon said custom as aforesaid, and with the permission, knowledge, and consent of the defendant, its agents, servants, and employes, the said Thomas Welch, within a very short time after he was informed by said section foreman that his services would not be needed or required at said time, did on said day board a freight train, which at said time was standing on defendant's track, at or near the depot of said defendant at the station of North Madison, which said freight train was run, managed, and operated by the servants and employes of said defendant, and which said train had no caboose or passenger car attached, and all the cars of which said train was composed were filled up with freight and the doors of all said cars were locked and barred; that it was at said time against the rules of said company to permit such laborers to ride on the engine attached to said freight trains; that after boarding the train the said Welch took a position on the front platform of the last freight car attached to said train, which said position was the safest place available for him to take on said train at said time, and he was standing, firmly grasping the brake-rod affixed to said car;" that on the journey to Madison the defendant so negligently managed said train that in passing over the defective part of the track, without fault of the plaintiff's intestate, but solely on account of the negligence of the defendant in suffering its track so to be and remain out of repair and in the negligent management of the train, the train gave a sudden jerk, and the plaintiff's intestate was suddenly jerked and thrown

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from his footing on said car to the ground, and injured, from which injuries he died, etc.

Appellee's demurrer was sustained to the complaint, and appellant refusing to amend, judgment was rendered against him.

Assuming that the complaint, in its general averments, states a cause of action, it is insisted that the specific facts pleaded affirmatively show, not only that the deceased was guilty of negligence contributing to his injury, but also that he assumed the risk. And we are inclined to this view. Conceding to appellant all that he claims, that appellee was negligent, and that his decedent was a passenger entitled to all the protection that relation requires, and the case stands thus: In the train Welch boarded there was no caboose or passenger coach; he was forbidden to ride on the engine, and all of the cars of the train were filled and their doors locked and barred; "with the permission, knowledge, and consent of the defendant," he boarded the train of his own accord, and, without direction, or knowledge of any employe of appellee, he took his position on the deadwood of a freight car between the first and second cars from the rear "as the safest place available to him", and stood there "firmly grasping the brake-rod." Boarding the train at such place for transportation, at first blush, appears to be a reckless disregard for personal safety. The general construction, width, and purpose of the "front platform", or deadwood, of a freight car, and the jerk of the cars in taking up slack in starting, and sometimes in the motion of the train and the difficulty of maintaining a fixed position on the deadwood in a sudden jar, or jerk, is a matter of common knowledge of which Welch had no right to be ignorant, and was required to heed. *Louisville, etc., R. Co. v. Bisch*, 120 Ind. 549.

Even if it was the duty of appellee to furnish the deceased transportation to Madison on a freight train, such duty did not excuse him in voluntarily boarding a train that clearly

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presented no suitable or safe place for a passenger to ride. He was chargeable with ordinary care of himself notwithstanding his right to carriage, and the voluntary placing of himself in a position on the train, palpably unsuitable for a passenger to occupy, and a place naturally unsafe for him to be during the movement of the train, must be imputed negligence *per se*. In such position he was not a passenger, and, therefore, appellee owed him no duty, except to avoid wilful injury. *Udell v. Citizens St. R. Co.*, 152 Ind. 507, 71 Am. St. 336; Elliott on Railroads, §1351.

In *Camden, etc., R. Co. v. Hoosey*, 99 Pa. St. 492, it was held that a passenger riding on the platform of a passenger coach, holding onto an iron rail fixed to the car, when there was standing room inside the coach, and whence from a sudden jerk of the train he was thrown to the ground and injured, was guilty of such contributory negligence as to preclude his right of recovery, and that the court should have so instructed the jury.

In *Secor v. Toledo, etc., R. Co.*, 10 Fed. 15, a passenger upon a passenger train, who took position on the lower step of the car, and stood there as the train slowed up for a station, and was thrown off and injured by a sudden jerk of the train, was held to be guilty of contributory negligence. To the same effect see *Hickey v. Boston, etc., R. Co.*, 96 Mass. 429. Because the position chosen was the "safest place" to ride counts for nothing. It was not a question of degree. Unless the train afforded some place of apparent safety he should not have embarked upon it.

Judgment affirmed.

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155	438
160	100
155	433
el71	354

**THE EEL RIVER RAILROAD COMPANY ET AL. v. THE
STATE, EX REL. KISTLER, PROSECUTING
ATTORNEY, ETC.**

[No. 18,397. Filed May 18, 1900. Rehearing denied Nov. 28, 1900.]

ABATEMENT.—Jurisdiction.—Waiver.—Objection to the jurisdiction of the court over the person of the defendant is waived, where the plea in abatement on that ground is filed after a full appearance, and a plea in bar is filed. *p. 439.*

CORPORATIONS.—Railroads.—Domicil.—For the purpose of determining the location of the domicil or residence of a domestic railroad company resort may be had to those principles which are applied in the case of natural persons. *p. 447.*

SAME.—Railroads.—Domicil.—Where a domestic railroad company had surrendered its property and franchises, under a lease in perpetuity, to another company, and ceased to do business as a railroad company, maintaining no office or agency in the State, its legal residence would be in the county where its principal office was located when it ceased to do business, although the annual meetings of stockholders were held in another county. *pp. 441-449.*

SAME.—Railroads.—Process.—Where a domestic railroad company had no officer or agent in the State except an agent appointed to receive and accept service of process, service in a county other than the one in which the suit was brought was sufficient. *pp. 449, 450.*

RAILROADS.—Leasing of Competing Road.—Statute Construed.—Under the act of March 8, 1865 (§§5209-5215 Burns 1894), authorizing railroad companies to lease intersecting and continuous lines, a railroad company is not permitted to surrender the control of its corporate property under a lease in perpetuity to a competing company operating a parallel road. *p. 455.*

SAME.—Forfeiture of Franchises.—Quo Warranto.—Sufficiency of Information.—In proceedings by the State in the nature of a *quo warranto* against a domestic railroad company to declare a forfeiture of its franchises on the ground that it has ceased to engage in the business for which it was organized, and has surrendered its corporate property and franchises to a rival company in order to destroy competition, the information need not aver that the acts complained of were prohibited by statute, or that public injury resulted therefrom. *p. 456.*

PARTIES.—Prosecuting Attorney as Relator.—Change of Venue.—Where a prosecuting attorney files an information in the nature of

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a *quo warranto* in the proper county, on his own relation, such prosecuting attorney remains the relator, though the venue is changed to another county. *p. 458.*

RAILROADS.—Lease of Corporate Property to Rival Company.—Effect of Second Lease of Like Character.—Where a railroad company leased its corporate property and franchises to a rival company in order to destroy competition, and afterwards a new lease of like character and for a like purpose was executed to the same company, the second lease had the effect of a new and substantive violation of the duties and obligations of the lessor. *p. 459.*

LIMITATION OF ACTIONS.—Statute Does Not Apply to State.—The statute of limitations does not, in civil actions, apply to the State. *p. 459.*

RAILROADS.—Forfeiture of Franchise.—Receiver.—In an action in the nature of a *quo warranto* against a railroad company to declare a forfeiture of its franchises, the court, in rendering judgment against such company, is authorized to appoint a receiver where it is asked for in the information. *p. 461.*

From the Howard Superior Court. *Affirmed.*

W. V. Stuart, C. B. Stuart, E. P. Hammond, D. W. Simms, Henry Crawford, W. R. Crawford, J. C. Blackledge, C. C. Shirley and W. H. Blodgett, for appellants.

W. L. Taylor, Attorney-General, W. A. Ketcham, G. S. Kistler, M. Winfield, M. Bell, W. C. Purdum, S. T. McConnell, A. G. Jenkins and G. C. Taber, for State.

DOWLING, J.—This was a proceeding by information, in the nature of a *quo warranto*, filed in the Cass Circuit Court, by the prosecuting attorney of Cass county, against the Eel River Railroad Company, a domestic corporation, charging it with doing and omitting acts amounting to a surrender and forfeiture of its rights and privileges as a corporation, and demanding a judicial declaration of such surrender and forfeiture.

The Wabash Railroad Company, as the lessee of the railroad and property of the Eel River Railroad Company, and a participant in the alleged wrongful acts and omissions of the Eel River Railroad Company, was properly joined as a codefendant with that company. §269 Burns 1894; *Bittinger v. Bell*, 65 Ind. 445.

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On a former appeal, by the defendants below, the judgment of the Fulton Circuit Court, to which the cause had been transferred upon a change of venue asked for by the defendants, was reversed, for the reason that the Cass Circuit Court, in which the suit was originally brought, had not obtained jurisdiction of the person of the Eel River Railroad Company. An attempt to bring the Eel River Railroad Company within the jurisdiction of the Cass Circuit Court had been made by issuing two writs of summons to the sheriff of said Cass county, requiring the said Company to appear to said action and to plead to the information therein on June 7, 1893, and causing the same to be served on the said company by reading to its secretary in the state of Massachusetts, and to one of its directors in the state of Michigan. On such former appeal, it was held by this court that the service of the writs, so made out of this State, was illegal, for the reason that the Eel River Railroad Company was organized under the laws of this State, and was therefore a resident of the State, and could not migrate. *Eel River R. Co. v. State, ex rel.*, 143 Ind. 231.

The mandate of this court was that the judgment of the Fulton Circuit Court be reversed, that the said court remand the cause to the Cass Circuit Court, and that the last named court sustain the motion of the Eel River Railroad Company to set aside the service of process. Subsequently, on the 12th day of February, 1896, an *alias* summons for the Eel River Railroad Company was issued to the sheriff of Cass county, and was returned not served, because that corporation was not found in Cass county, and had no officer or person authorized to transact its business residing in that county upon whom process could be served. Similar writs were issued on the same day, February 12, 1896, to the sheriffs of the counties of Miami, Wabash, Kosciusko, Whitley, Allen, Noble, and DeKalb, respectively, these being all of the counties in which and through which the railroad of the said Eel River Railroad Company was con-

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structed; and to each of these writs a like return of "Not found," etc., was made.

An order for notice to the Eel River Railroad Company, by publication, under section one of an act approved December 21, 1858 (Acts 1858, p. 42) was next taken by the plaintiff below. The Eel River Railroad Company thereupon entered a special appearance to the action, and moved to set aside the order of publication, on the ground, among others, shown by affidavit filed on behalf of the said company in support of its motion, that, prior to February 12, 1896, and ever since that date, one William V. Troutman, a citizen of the State of Indiana, residing at Butler, in DeKalb county, Indiana, was, and had been, and then remained the regularly appointed and constituted general agent of the Eel River Railroad Company, upon whom any process issued against it could be served, and with like effect as if the service had been on the president or directors of said company. An *alias* summons for the Eel River Railroad Company was then issued to the sheriff of DeKalb county, who made return thereto, showing that he had served the same on the said Eel River Railroad Company by reading it to William V. Troutman, the general agent of the said company, there being no chief officer, or other higher officer of the said corporation found in said DeKalb county, and by delivering to the said Troutman, as such general agent, a copy of the writ.

The motion of the Eel River Railroad Company to strike out the order for publication was overruled, and proof of publication of a notice to that company to appear to and answer the information was duly made.

An amended information having been filed by the plaintiff below, the Eel River Railroad Company filed its answer in abatement, properly verified, denying the jurisdiction of the Cass Circuit Court over its person. To this plea, the plaintiff below replied in two paragraphs, the first being special in its character, and the second a denial of the matters stated in the plea.

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At this stage of the proceedings, the Wabash Railroad Company also filed an answer in abatement. Upon the application of the Eel River Railroad Company, the venue was changed to Howard county, and the cause was transferred to the Howard Circuit Court.

On motion of the plaintiff below, the answer of the Wabash Railroad Company in abatement, was stricken from the files, for the reason that it was filed too late, and after divers steps in the cause taken by that defendant.

A demurrer to the first paragraph of the reply to the answer of the Eel River Railroad Company in abatement was filed, but the record fails to show what disposition was made of it. We must presume that it was overruled.

The issues upon the plea in abatement filed by the Eel River Railroad Company were submitted to a jury for trial, and, at the request of both the parties, the jury were directed to return a special verdict in the form of answers to interrogatories framed under the direction of the court.

On the return of the special verdict, the Eel River Railroad Company moved for judgment in its favor, and its motion was overruled. A motion by the Eel River Railroad Company for a new trial was also made and overruled. Judgment was thereupon entered in favor of the plaintiff upon the issues tried. At this point, the cause was, for some reason not disclosed by the record, but without objection by any of the parties, transferred to the Howard Superior Court.

After the removal of the cause to the Howard Superior Court, a motion was made by the Eel River Railroad Company to dismiss the action for the want of a proper relator. Pending this motion, George S. Kistler, who had been re-elected prosecuting attorney for the judicial circuit composed of the county of Cass, was substituted as the relator, and the motion to dismiss was overruled.

Each defendant filed a demurrer to the amended information, and these demurrers were overruled.

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The Eel River Railroad Company answered in four paragraphs, and the Wabash Railroad Company filed its separate answer. The record fails to show that any reply was filed to the answer of either defendant.

The cause was tried by a jury and a general verdict was returned for appellee, with answers to numerous interrogatories filed by the parties respectively. A motion by the appellants for an order requiring the jury to answer the fifteenth and sixteenth interrogatories was overruled. Separate motions by the appellants for a new trial and for judgment on the answers to the interrogatories were made and overruled. Motions by the Eel River Railroad Company for a *venire de novo*, and in arrest, were overruled.

Appellee moved for the appointment of a receiver, and the motion was sustained.

Judgment was rendered upon the verdict that the franchises of the Eel River Railroad Company be, and that the same were, forever forfeited and annulled; that the Wabash Railroad Company was unlawfully in the possession of the corporate property of the Eel River Railroad Company, and that it was unlawfully exercising the franchises of that company; that the Eel River Railroad Company and the Wabash Railroad Company, and each of them, be ousted and excluded from the said Eel River Railroad, its powers, franchises, property, and corporate rights, and from the possession and enjoyment of the same; and that the Eel River Railroad Company be dissolved.

It was further adjudged that a receiver be appointed to take possession of the said Eel River Railroad Company, its railroad, property, and franchises, to receive the assets of the said company, and to sell and dispose of the same under the orders of the court, and in accordance with the law in such cases. A receiver was appointed by the court, and the person so appointed gave bond and qualified. The judgment defined the specific powers and duties of the receiver. He was authorized to seize and take possession of all the

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property of the Eel River Railroad Company, including its railroad, rolling-stock, books, papers, etc., and to hold the same subject to the further orders of the court. He was empowered to bring all necessary suits in his own name as such receiver for the recovery of the property, assets, rights, and franchises of the Eel River Railroad Company, and for the preservation of the same, and the Eel River Railroad Company and the Wabash Railroad Company were ordered to deliver to the receiver all the property of the Eel River Railroad Company in their possession, or under their control, or in the possession or under the control of either of them.

Motions to modify the judgment were made by the appellants, and were overruled.

The errors assigned and discussed upon this appeal are the following: (1) The court erred in striking out the answer in abatement of the Wabash Railroad Company; (2) the court erred in overruling the motion of the Eel River Railroad Company for judgment in its favor on the special verdict returned on the issue upon its answer in abatement; (3) the court erred in overruling appellants' several demurrers to the amended information; (4) the court erred in overruling appellants' motions for judgment on the special findings of the jury; (5) the court erred in overruling appellants' separate motions for a new trial; (6) the court erred in appointing a receiver; (7) the court erred in refusing to modify the judgment.

The supposed errors so assigned will be considered in their order:

(1) Did the court err in striking out the answer of the Wabash Railroad Company in abatement of the action? Pleas in abatement of the writ or action being dilatory, and tendering no issue as to the merits of the controversy, have always been regarded by the courts with some degree of disfavor, and the rules governing them enforced with much strictness. In all transitory actions, objections to the juris-

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diction of the court over the person of the defendant may be waived, and, unless such objections are made promptly, and without delay, a waiver will be presumed. A full appearance to the action for any purpose, other than to present such objection by way of motion or plea, operates as a waiver of the objection, and confirms the jurisdiction of the court over the defendant. Jurisdiction of the person, once lawfully acquired, continues through all subsequent proceedings in the cause. 1 Chitty on Pleading 457; Stephen on Pleading (9th Am. ed.), 352; Gould's Pleading (2nd ed. 1899), 40; §368 Burns 1894, §365 R. S. 1881; *Watts v. Sweeney*, 127 Ind. 116; *Newell v. Gatling*, 7 Ind. 147; *Brink v. Reid*, 122 Ind. 257; *Ford v. Ford*, 110 Ind. 89; *Sunier v. Miller*, 105 Ind. 393; *Gilbert v. Hall*, 115 Ind. 549; *Slauter v. Hollowell*, 90 Ind. 286; *Wabash, etc., R. Co. v. Lash*, 103 Ind. 80; *Singleton v. O'Blenis*, 125 Ind. 151; *Black v. Thompson*, 107 Ind. 162; *Kinser v. Dewitt*, 7 Ind. App. 597; *Keiser v. Yandes*, 45 Ind. 174; *Needham v. Wright*, 140 Ind. 190; *Collins v. Nichols*, 7 Ind. 447; *Kelley v. State*, 53 Ind. 311; *Ward v. State*, 48 Ind. 289; *Indianapolis, etc., R. Co. v. Ott*, 11 Ind. App. 564.

The Wabash Railroad Company was regularly served with a summons requiring it to appear in the Cass Circuit Court on a day named, and on the 7th day of June, 1893, by its attorneys, that company entered a full appearance to the action. On the 12th day of June, 1893, it applied for a change of venue, and its motion was sustained. October 11, 1893, it filed a motion to strike out parts of the complaint. October 12, 1893, it demurred to the complaint. February 6, 1894, it filed its separate answer in bar. Other steps were subsequently taken by the Wabash Railroad Company, but it is not necessary to set them out. On May 1, 1896, nearly three years after it had entered its full appearance in the cause, the Wabash Railroad Company filed its answer in abatement, then for the first time calling in question the jurisdiction of the court over its person.

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It is entirely clear that this objection was not available to the Wabash Railroad Company when made. After a full appearance, the filing of divers motions, and a plea in bar, this appellant must be conclusively presumed to have waived any objection to the jurisdiction of the court, and to have fully submitted itself to that jurisdiction.

The reversal of the judgment of the Fulton Circuit Court on the ground that the Cass Circuit Court had not jurisdiction of the person of its codefendant, the Eel River Railroad Company, thereby vacating the proceedings of the Fulton Circuit Court, did not, in our opinion, relieve the Wabash Railroad Company from the legal effect of the steps taken by it in the cause. On that appeal no question was made or decided as to the jurisdiction of the court over the Wabash Railroad Company. It is also to be observed that the full appearance of this appellant was made in the Cass Circuit Court, and its application for a change of venue from that county took place prior to the removal of the cause to Fulton county, and long before the proceedings in the Fulton Circuit Court which were vacated by the reversal of the judgment. These facts, in connection with the long delay, in interposing the objection, under the settled rules of pleading and practice, wholly disabled the Wabash Railroad Company to assert a want of jurisdiction of the Cass Circuit Court over its person, and consequently the court did right in striking from the files its answer in abatement. *Brink v. Reid*, 122 Ind. 257; *Watts v. Sweeney*, 127 Ind. 116, 22 Am. St. 615.

(2) Was the Eel River Railroad Company entitled to a judgment in its favor upon the special verdict upon the issue made by its answer in abatement and the reply thereto? The determination of this question depends upon the facts found as to the legal residence or domicil of the Eel River Railroad Company at the time of the commencement of the suit; the capacity of the supposed agent and representative of that corporation on whom the summons

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was served to receive, and be subject to service of process on behalf of the corporation; and the place and manner of the service of the writ.

The material parts of the special verdict were as follows: The Detroit, Eel River & Illinois Railroad Company was a corporation organized under the laws of this State to build and operate a railroad from Logansport, in Cass county, Indiana, eastward through the counties of Cass, Miami, Wabash, Kosciusco, Whitley, Allen, Noble and DeKalb, and it was so constructed. The railroad and other property of the Detroit, Eel River & Illinois Railroad Company was afterwards sold under a decree of foreclosure rendered by the Cass Circuit Court. In 1877 a new corporation, known as the Eel River Railroad Company, was organized under the laws of the State of Indiana, for the purpose of purchasing the railroad and other property of the Detroit, Eel River & Illinois Railroad Company, and the corporation, so organized, after acquiring the said railroad property, operated the railroad so purchased until the fall of 1887. The road was equipped with rolling-stock and machine shops. The general offices and general shops of the Detroit, Eel River & Illinois Railroad Company, and of its successor, the Eel River Railroad Company, were located at Logansport, Cass county, the western terminus of said railroad, and not elsewhere. In the fall of 1879, the Eel River Railroad Company, by contract with the predecessor of the Wabash Railroad Company, surrendered the possession of its road, rolling-stock, and equipment to the said Wabash Railroad Company, discharged all of its agents and employes in the State of Indiana, and, by the order of its board of directors, removed its general offices, books, papers, and other documents from Logansport, Cass county, Indiana, to the city of Detroit, in the state of Michigan, from whence they were afterwards removed to Boston, Massachusetts. The Eel River Railroad Company has had no office, officer, or employe except William V. Troutman in

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the State of Indiana since said contract and surrender in 1879. On October 6, 1887, the Eel River Railroad Company entered into a lease with the Wabash Western Railway Company, of the state of Missouri, whereby the former company leased to the latter, in perpetuity, its railroad property, including rolling-stock, equipment, and franchises. The Wabash Western Railway Company afterwards consolidated with certain other railroads in Illinois, Indiana, and Ohio, under the name of the Wabash Railroad Company, and the said Wabash Western Railway Company, and its successor, the Wabash Railroad Company, have been in the absolute possession and control of the Eel River Railroad, its rolling-stock, equipment, and franchises, and have been operating said road since October 6, 1887. The Eel River Railroad Company has done no business or corporate act as a railroad company in the management and control of its property in the State of Indiana, since the fall of 1880, except to hold annual meetings of the stockholders at Butler, in DeKalb county. At these meetings nothing was done further than to reelect directors, and, at the meeting of November 7, 1888, to ratify the said lease of October 6, 1887. Since October 6, 1887, the Eel River Railroad Company has done nothing more than to maintain its corporate existence for the purpose of collecting the rentals reserved in the said lease of October 6, 1887, and distributing the same to its stockholders. The last general offices of the Eel River Railroad Company, prior to 1880, were at Logansport, Cass county, Indiana, and since that date it has had no office in this State. Previously to February 27, 1896, and since the removal of its general offices from Logansport, Indiana, the Eel River Railroad Company had not filed, or caused to be filed, in the clerk's office of any county, along the line of its road, into which or through which the railroad runs, the appointment of any person as agent, nor from the date of such removal of its offices to February 22, 1896, had it any officer, director, agent, or

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representative in the State of Indiana. On February 22, 1896, one William V. Troutman, who was then and there an agent of the Wabash Railroad Company, filed in the office of the clerk of DeKalb county, at Butler, in said county, his appointment as general agent of the Eel River Railroad Company. Said Troutman has ever since remained an agent of the Wabash Railroad Company. He has been paid by that company, and not by the Eel River Railroad Company. He has performed no services for the Eel River Railroad Company. He has no duties as the agent of that company. He has had the possession of no books, papers, or property of that company, and the object of his appointment was to defeat the jurisdiction of the Cass Circuit Court. There has been no appointment by the said Eel River Railroad Company of any other agent, or of any other agent to receive process, at any time since 1879, in any of the counties into which or through which the Eel River Railroad Company's railroad passes. On the 12th day of February, 1896, a summons for the Eel River Railroad Company in this cause was issued to the sheriff of Cass county, by the order of the Cass Circuit Court, and came to the hands of such sheriff on the 13th day of February, 1896, upon which the said sheriff made return February 13, 1896, as follows: "I hereby certify that I have not served this summons because the within named Eel River Railroad Company is not found in my bailiwick, and that said corporation, the Eel River Railroad Company, has no officer or person authorized to transact its business residing in said Cass county, where said corporation has been located, and has exercised its powers, upon whom process can be served." On the 13th day of April, 1896, by the order of the Cass Circuit Court, a summons for the defendant, the Eel River Railroad Company, was issued to the sheriff of DeKalb county, and was duly served on William V. Troutman as the general agent of that company April 17, 1896. Writs of summons were also issued to the sheriffs of Miami,

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Wabash, Whitley, Kosciusco, Allen, Noble, and DeKalb counties, respectively, on the 12th day of February, 1896, each of which writs was returned with the indorsement, "No officer or agent found of the defendant, the Eel River Railroad Company, upon whom summons could be served." The Wabash Railroad Company, since 1889, has continuously had and maintained, in the county of Cass, offices and agents for the transaction of its business, and for twenty years it and its predecessors have had nineteen miles of railroad running through the county of Cass, in the State of Indiana, and said Wabash Railroad Company, since 1889, continuously has kept and maintained offices in the city of Logansport for use and occupation in the transaction of its business. One Charles G. Newell was the agent of the Wabash Railroad Company in Logansport, Indiana, for the transaction of its business at that point, in May, 1893, when the summons in this case for the said Wabash Railroad Company was served upon him. The offices of the Wabash Railroad Company at Peru, Indiana, are under the control and direction of the principal office of that company at St. Louis, Missouri. At and after May 1, 1893, and down to the time of the filing of the answer in abatement in this action, the Eel River Railroad Company did not at any time have or maintain its principal office or place of business in Cass county, Indiana; it did not during any part of such period have an agent located at, or residing in, said Cass county, nor did it, during such period, transact any business in said Cass county, or maintain any office therein. No meeting of its stockholders or directors was held in said Cass county between May 1, 1893, and the date of the filing of the plea in abatement herein. At no time in that interval was the Eel River Railroad Company operated from any office or agency in Cass county. Since 1881, the stockholders meetings of that company, each year, for the election of directors, and the transaction of other business, were held at Butler, DeKalb county, Indiana, and from 1881

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to 1896 such meetings were convened upon notices published by the secretary in newspapers in each county where any stockholders resided, and in pursuance of notices forwarded by the secretary, by mail, to every stockholder of the corporation. The change in the place of holding the annual meetings of the stockholders of the Eel River Railroad Company from Logansport, in Cass county, to Butler, in DeKalb county, was made by resolution adopted at the annual stockholders' meeting held at Logansport, November 6, 1880, and thereafter no such meeting was held in Cass county. Annually, since 1880, the stockholders of said Eel River Railroad Company have convened at Butler, DeKalb county, and have elected directors of said company. From May 1, 1893, and from thence continuously to the time of the filing of the answer in abatement, the principal office and place of business of the Wabash Railroad Company, in Indiana, was at Peru, in Miami county. During this period, one Emmet A. Gould was the division superintendent of the Wabash Railroad Company, in charge of all the agents employed, and persons engaged in the operation of any part of said railroad in the State of Indiana, with authority to employ and discharge such employes. All trains on said railroad were moved upon instructions from the office of the said division superintendent. The offices of the train despatcher of said Wabash Railroad Company in Indiana, road master, resident engineer, division superintendent of bridges, and master of transportation were maintained and operated at Peru, in Miami county, and the highest officer of said Wabash Railroad Company, located at, and residing in, Cass county, was a local station agent, the said Wabash Railroad being managed from the office of the division superintendent located at Peru, Miami county.

It is indispensably necessary to the exercise of the supervisory authority of the State over railroad corporations created by it, and owning property and enjoying corporate franchises within its territory, that every such

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corporation should be regarded as having a domicil, or place of residence, within the State for the purposes of jurisdiction, litigation affecting its rights and duties, and the taxation of its personal property. When questions arise touching the location of such domicil or residence, for the purpose of determining the same, resort may be had to those principles which are applied in the case of natural persons. Among the most familiar of these are the rules that every citizen of the State has a residence somewhere within one of the counties of the State, in which alone he can claim certain political and civil rights, and in which he must be sued in transitory actions in which he is the sole resident defendant; that a legal residence once established remains until a new one is acquired; and, that a purpose to change such residence, unaccompanied by actual removal or change of abode, does not constitute a change of domicil. *Sears v. City of Boston*, 1 Metc. 250; *Culbertson v. Board, etc.*, 52 Ind. 361; *Thompson on Corp.* §7999; *Buckley v. Inhabitants of Williamstown*, 3 Gray 495; 5 Am. & Eng. Ency. of Law (1st ed.), 865, and notes; *Jacobs on Domicil*, §§81, 82, 91, 93, 104, *et seq.*

The visitation of civil corporations is by the government itself, through the medium of the courts of justice, which exercise common law jurisdiction over all such corporations by writ of *mandamus*, and by information in the nature of *quo warranto*. The State which creates the corporation has the right, at all times, to inquire, through the courts, into abuses of its franchises by a body politic, and, in case of non-user or misuser, by the same medium to impose the penalty of forfeiture according to the course of the common law, or in pursuance of statutes applicable to such cases. 2 Kent's Com. 300, 305. It is, therefore, one of the duties which a domestic corporation owes to the State to maintain a place of residence, or domicil, at which the sovereign may call upon it to show cause why its franchises should not be seized, and the corporation dissolved; and where a disposi-

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tion is manifested to neglect or evade this obligation, or the management of the corporate business is of such a character as to render the location of such residence doubtful, the courts will not nicely weigh the evidence when compelled to determine which one of several counties into which, or through which, the railroad passes, is the legal domicile of the corporation. Under such circumstances, the corporation should not be permitted to take advantage of the uncertainty created by its own acts, and a very slight preponderance of the evidence should be held sufficient to sustain the jurisdiction of the court over the person of the defendant.

The general rule of the statute is that an action shall be commenced in the county where the defendant, or one of the defendants, has his usual place of residence. §314 Burns 1894. This rule applies as well to corporations as to natural persons. The statutory exceptions to it authorize the bringing of the suit, under some circumstances, in counties other than that in which the defendant has his, or its, usual place of residence, but they do not prevent the bringing of the suit in the county of such usual residence.

The controlling facts as to the usual place of residence of the Eel River Railroad Company, found by the special verdict, are that, so long as that corporation held the possession of and operated its railroad, its principal offices and place of business were at Logansport, in Cass county, Indiana, the western terminus of its road, and that at no time since the Eel River Railroad Company transferred the use and possession of its railroad to other corporations had it any office for the transaction of its business as a railroad company in any county in the State of Indiana. The place of the principal office of a railroad corporation, where its business is transacted, and where its books and records are kept, is generally considered the residence of such corporation.

The fact that after the surrender of the railroad, its prop-

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erty, and business, to another railroad company, the annual meetings of the stockholders of the Eel River Railroad Company were held at Butler, in DeKalb county, and that the company, for the purpose of defeating the jurisdiction of the Cass Circuit Court, after the commencement of this action, maintained a nominal agent there, without an office, without a salary, and without duties, except to receive service of process, does not, in our opinion, change the effect of the findings of fact as to the location of the principal offices and place of business at Logansport, in Cass county. *Platt v. New York, etc., R. Co.*, 26 Conn. 544; *Connecticut, etc., Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. ed. 569.

The appellant, the Eel River Railroad Company, was a domestic corporation. Its railroad was wholly within the State of Indiana, yet, when this proceeding was instituted, it had no office or officer, agent or agency, in any of the eight counties in which, and through which, its road was constructed. Writs issued to the sheriffs of all of these counties were returned "Not found," because there was no officer or person in any one of them on whom service could be made. So long as the corporation attempted to carry out the purposes for which it was organized, so long as it engaged in the business of operating its railroad, it maintained its principal offices and place of business at Logansport, in Cass county, and its legal residence was, therefore, in that county. No new residence having been acquired by the company, we think that the residence so established should be held to have continued, and that the action was properly brought in Cass county. The action having been properly brought in that county, the statute expressly authorized service of the summons in any other county in the State where any person, authorized to transact business in the name of the corporation, officer, or agent, could be found. §318 Burns 1894. William V. Troutman, having been appointed the agent of the company in DeKalb county "to

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receive and accept service of process with like effect as if served upon the president and directors of the Eel River Railroad Company," we hold that service of the summons on him in DeKalb county was sufficient and legal service upon the company in the action pending in the Cass Circuit Court. We conclude, therefore, that the motion of the Eel River Railroad Company for judgment in its favor upon the special findings was properly overruled.

(3) Was there error in overruling the demurrers to the amended information? Omitting the formal commencement, the material facts alleged were the following: That, on the 4th day of December, 1877, the Eel River Railroad Company was incorporated under the laws of the State of Indiana, for the purpose of owning, operating, and maintaining a railroad lying wholly within said State, and extending from Logansport, in Cass county, eastward, through the counties of Miami, Wabash, Kosciusko, Whitley, Allen, and Noble, to the town of Butler, in DeKalb county, in said State, a total length of about ninety-four miles, and formerly known as the Detroit, Eel River & Illinois Railroad. That, by virtue of such incorporation, the Eel River Railroad Company was authorized to, and did, take possession of the said railroad, its property, and franchises, and held and operated the same. That at the time said Eel River Railroad Company took possession of said property, said Railroad was fully constructed, completed, and equipped with ninety-four miles of main track, with side-tracks, switches, depots, stations, roundhouses, and machine shops, located at Logansport and Butler, with engines and cars sufficient to do a large passenger and freight business, and was fully equipped for the accommodation of the public along the line of said railroad. That, on or about October 6, 1887, said Eel River Railroad Company executed and delivered to the Wabash Western Railway Company a lease of said Eel River Railroad for a period of ninety-nine years, renewable in like periods, at the option of said lessee, for-

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ever. That, in order to keep the public authorities in ignorance of said lease, its terms and conditions, and of the utter abandonment of its corporate duties and functions by the said Eel River Railroad Company, said lease was never recorded in any county, in the State of Indiana, but was withheld from the records and was unknown to the public authorities until just before the institution of this suit. That, by the terms of the said lease, the Wabash Western Railway Company was given full and exclusive power, right, and authority, to use, manage, and operate said Eel River Railroad, its property, franchises, etc., in the place and stead of the Eel River Railroad Company, with the exclusive right to collect and receive such tolls as said lessee might, from time to time, establish, and all rents, issues, and profits arising from the possession and operation of the said railroad, etc. That, by the said lease, the Wabash Western Railway Company covenanted to maintain and operate said railroad at its own expense as if it were the owner thereof, and to perform all the duties and obligations of the Eel River Railroad Company. That, immediately upon the execution of the said lease, and in compliance with the terms thereof, the Eel River Railroad Company voluntarily surrendered the whole of its said railroad, property, and franchises, to said Wabash Western Railway Company, discharged all of its servants, agents, and employes, and finally ceased thereafter to operate said Eel River Railroad, or to exercise the franchises thereof. That the president of the said Eel River Railroad Company, its secretary and treasurer live in Massachusetts, and its directors in Massachusetts, Michigan, and other states, but none of them in the State of Indiana; and that since the execution of the said lease the said Eel River Railroad Company has not had any officer, director, agent, or employe, resident in the State of Indiana, upon whom process could be served, and that the sole and only business now conducted by the Eel River Railroad Company is the re-

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ceipt and division of the semiannual rental paid to it under the said lease, which business is conducted in the office of its secretary and treasurer, in the city of Boston. That, immediately after the execution of said lease, and by virtue thereof, the said Wabash Western Railway Company took possession of the said Eel River Railroad, etc., and held and kept possession thereof until July, 1888, on or about which time the Wabash Western Railway Company and certain other railroad corporations operating different portions of the Wabash line of railroad became, and were, consolidated into one new corporation, organized under the laws of the State of Indiana, known as the Wabash Railroad Company. That the Wabash Western Railway Company, the original lessee, was a railroad corporation, organized under the laws of Missouri, and owned no railroad in Indiana. That at the time of the execution of the said lease it was a part of the contemplated plan to consolidate several railroad companies in Missouri, Illinois, Indiana, Ohio, and Michigan under the name of the Wabash Railroad Company, and as a part of such plan said lease was executed to said Wabash Western Railway Company, so that said consolidated company, when formed, might acquire or absorb said Eel River Railroad, a competing line with the main line of the Wabash Railroad Company, eastward. That said plan of consolidation was fully carried out, and the Wabash Western Railway Company turned over to the Wabash Railroad Company, and said latter company took possession of all the property, real and personal, and franchises of the Eel River Railroad Company, all of said facts as to such consolidation and the purposes of the said lease being known to the said Eel River Railroad Company. That said Wabash Railroad Company, by virtue of the said lease, and not otherwise, entered upon and took possession of the said railroad and property with the consent of the said Eel River Railroad Company, and has ever since exercised the functions and franchises of said Eel River Rail-

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road Company, and received the tolls and profits thereof, and that it still continues to hold the same without any authority of law. At the time the officers, agents, and employes of the said Eel River Railroad Company left the State of Indiana, the principal offices and shops of the said company were located at Logansport, Cass county, in said State, where its superintendent and general manager resided, and from which point the said road was operated. That since said offices were abandoned, said company has performed no corporate acts within the State of Indiana. That, before the commencement of this suit, attempts were made to hold annual meetings of stockholders of the Eel River Railroad Company at Butler, in DeKalb county, Indiana, but that said meetings were void for want of proper notice, and because they were held under orders made by the board of directors in the state of Massachusetts, and not otherwise. That the said Wabash Railroad Company owns and operates a competing line of railroad extending from Kansas City, Missouri, and other western points, to Toledo, Ohio, whose main line parallels the said Eel River Railroad through its entire length, and whose interests are antagonistic and adverse to the Eel River Railroad Company. That, since coming into the possession of the said Eel River Railroad, the said Wabash Railroad Company, with the permission of the said Eel River Railroad Company, has used the same to destroy its competition, and as a feeder for its own main line, operating it for the benefit of its own traffic, and dwarfing and ignoring the proper business of the Eel River Railroad Company, and the accommodation of its patrons along its line. That the Wabash Railroad Company, with the consent of the Eel River Railroad Company, has abandoned that portion of its road extending from Logansport to Chili, a distance of twenty-two miles, has torn up and destroyed the switches and side-tracks, permitted its track, buildings, and bridges to go to decay, has dismantled and destroyed the roundhouse

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and machine shops at Logansport, and removed them to Peru, on its own main line, and intends to dismantle and destroy the roundhouse and machine shops at Butler, and to remove them to its own main line. That the said Eel River Railroad was projected and built as a competing line of the Wabash Railroad, and that for the purpose of obtaining such competing line, the people along the line of said railroad voted, and contributed, \$300,000 in aid of its construction.

It was further charged that the Wabash Railroad Company holds possession of the Eel River Railroad, its property and franchises, without right; that it has usurped, intruded into, and unlawfully exercised the corporate franchises of said company, and is unlawfully operating said railroad, and exercising such franchises. Prayer that the charter and franchises be declared forfeited, that the defendants be ousted from said railroad and franchises, and that a receiver be appointed to take possession of said railroad, its property, etc., and wind up the affairs of the said Eel River Railroad Company.

The acts and omissions for which a forfeiture of the franchises of the Eel River Railroad Company and a dissolution of that corporation are demanded are these: The execution of a lease to the Wabash Railroad Company for a term of ninety-nine years, with the right of perpetual renewal at the option of the lessee; the surrender and abandonment of the possession and control of its railroad by the Eel River Railroad Company; the closing of all its offices, and the discharge of all its agents and employes; the destruction of twenty-two miles of its railroad from Logansport to Chili, with all of the side-tracks, switches, and bridges on that part of its line; the dismantling and removal of its roundhouses, and machine shops; the total diversion of the railroad from the purpose of its construction as a competing line with the Wabash Western Railway Company and the Wabash Railroad Company, and its conversion into an interrupted, subordinate, and tributary road.

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It is insisted on behalf of the appellants that the leasing of the railroad was authorized by the act of March 3, 1865, §5209-5215 Burns 1894, but as that act, in terms, applies to intersecting and continuous lines only, and to such railroads as have not been equipped and operated in whole or in part, it does not sustain the argument of the appellants. It is also contended that the lease, and subsequent surrender and abandonment of the control of its railroad by the Eel River Railroad Company, were sanctioned by the general legislative policy of the State, but we fail to find in any act of the legislature anything which countenances so complete a departure from the objects for which the Eel River Railroad Company was organized, and for which its railroad was constructed. The phrase "legislative policy" is vague at best, and can seldom be regarded as a substantial basis for important legal rights. In the absence of more definite authority, it cannot be held to sanction deliberate violations of the law, omissions of duty to the public and the State, vast and dangerous extensions of corporate privileges, and an abandonment of the objects for which the corporation was created.

If it were true, as appellants affirm, that the corporation did not impliedly agree with the State that it would operate the railroad with its own employes, and never transfer its franchises or property, still, we think it clear that it did impliedly agree that it would not, without the permission of the State, destroy a part of its line of railroad, change its terminal points, and turn over to a rival and competing company the possession, control, and exclusive management of the whole of its corporate property, and the enjoyment of all its corporate franchises.

Although incorporated under the act of March 3, 1865, nevertheless it was subject to the general provisions of the laws of this State, as far as it is possible to construe them together, and there is nothing in the act of March 3, 1865, which relieved the Eel River Railroad Company from the

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ordinary obligations to the State and to the public to which all such corporations are subject.

It was not necessary that the information should aver that the delinquent company had done any act in contravention of a prohibitory statute, or of a statute imposing a definite penalty. A forfeiture of corporate existence and franchises may result, although no statute in express terms enjoins or prohibits the acts or omissions complained of. While certain specific acts and omissions may, by statute, be made causes of forfeiture of the charter or franchises of corporate bodies, yet it is generally recognized that misuser, and non-user, of such franchises, even where the specific offenses are not particularly defined by statute, are sufficient grounds for proceedings for such forfeiture and dissolution. *State Bank v. State*, 1 Blackf. 267, 12 Am. Dec. 234; *People v. Kingston, etc., R. Co.*, 23 Wend. 193; *People v. Bristol, etc., Co.*, 23 Wend. 222; *Thompson v. People*, 23 Wend. 537; *People v. Hillsdale, etc., Co.*, 23 Wend. 254; *People v. Bank*, 6 Cow. (N. Y.) 216; *State v. Seneca County Bank*, 5 Ohio St. 171; *St. Louis, etc., Co. v. Sandoval, etc., Co.*, 116 Ill. 170, 5 N. E. 370; *Ward v. Sea Ins. Co.*, 7 Paige (N. Y.) 294; *In Re Jackson Ins. Co.*, 4 Sandf. Ch. (N. Y.) 596; 5 Thompson on Corp. §6618; *Dartmouth College v. Woodward*, 4 Wheat. 519, 4 L. ed. 629; Morawetz on Priv. Corp., §§1114, 1115; *New York, etc., R. Co., v. Newman*, 17 How. 30, 15 L. ed. 27; *Territt v. Taylor*, 9 Cranch 52, 3 L. ed. 650; *State v. Minnesota R. Co.*, 36 Minn. 246, 30 N. W. 816; *State v. Portland, etc., Co.*, 153 Ind. 483; *Pennsylvania R. Co. v. St. Louis, etc., Co.*, 118 U. S. 290, 630, 6 Sup. Ct. 1094, 7 Sup. Ct. 24, 30 L. ed. 83, 284; *Board, etc., v. Lafayette, etc., R. Co.*, 50 Ind. 85; *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 83; Elliott on Railroads, §§48, 49, and §50, note 5; *State, ex rel., v. Atkinson, etc., R. Co.*, 24 Neb. 143, 38 N. W. 43, 2 L. R. A. 564, 8 Am. St. 164, and notes.

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It may be conceded that not every act in excess of corporate capacity will justify a forfeiture; but in the present case a much more serious charge is made. A lease in perpetuity to a competing company; a total surrender of the railroad, its property and franchises; an abandonment of the control and management; the wrecking and destruction of a considerable part of the line of the railroad; the dismantling and removal of roundhouses and machine shops; the closing of all offices and agencies; the discharge of all employes, agents, and officers in this State; the removal of all books and papers relating to the business of the corporation from the State of Indiana; and the management of the affairs of the company by the officers of a competing line of railroad in such manner as to promote the interests of such competing line without regard to the interests or duties of the line so controlled,—constitute a state of facts wholly different in character and legal effect from those acts in excess of corporate capacity which have been held insufficient to authorize a forfeiture.

It is further said by counsel for appellants that the lease was not prohibited by law, nor wrongful in itself, and that the information contains no averment that public injury resulted from the acts complained of. In answer to this, it is sufficient to say that the lease to the competing company was not authorized by any statute; that its execution and the consequent abandonment of its railroad by the Eel River Railroad Company were against public policy; and that from the facts averred in the information injury to the public may be conclusively presumed. Elliott on Railroads, §49; *Board, etc., v. Lafayette, etc., R. Co.*, 50 Ind. 85; *East St. Louis, etc., R. Co. v. Jarvis*, 92 Fed. 735, 34 C. C. A. 639; *Central, etc., Co. v. Indiana, etc., Co.*, 98 Fed. 666, 39 C. C. A. 220.

The execution of the lease to the Wabash Railroad Company and the disability resulting from such lease rendered the lessor company incapable of performing its duties to the

State and to the public, and to that extent were violations of its charter, and breaches of the implied conditions upon which its right to exist depended. These facts, in connection with the other grounds of forfeiture alleged in the information, consisting of a total, and apparently final, suspension of the business and functions of the Eel River Railroad Company; the abandonment of all means and agencies by which that business was carried on, and those functions performed; the acquiescence of the company in the destruction of a considerable portion of its railroad and other property; and its attempted migration from the State, were, as we think, sufficient in law to sustain a judgment of ouster and a dissolution of the corporation.

Objection is made that the action was not brought in the proper county, but, for the reasons already given in this opinion, we think the suit was properly commenced in the Cass Circuit Court.

It is also insisted that when the venue of the cause was changed from Cass county to Howard county, there should have been a change of the relator, and that the prosecuting attorney of the Howard Circuit Court should have been substituted. We cannot adopt this view. The action was a civil one, and a change of venue did not require a change of parties. Originating as it did in Cass county, the prosecuting attorney of that county was the proper relator, and so remained, notwithstanding the removal of the cause from that county. The statute provides that the information may be filed by the prosecuting attorney in the circuit court of the proper county, upon his own relation, whenever he shall deem it his duty to do so, or shall be directed by the court, or other competent authority. §1146 Burns 1894.

It certainly was not intended that upon every change of venue there should be a change of the relator. Counsel for appellants refer us to no authority in support of this position, and we have been able to find none. The analogy to criminal practice and pleading, suggested by counsel for

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appellants, does not sustain their argument. On a change of venue in a criminal case prosecuted by information, the name of the prosecuting attorney subscribed to the pleading is never changed, nor is any other alteration of the pleading necessary. Whether the prosecuting attorney, who filed the information in the nature of a *quo warranto*, can be compelled to go out of his district to prosecute the proceeding is another question, and is not before us. *Thompson v. Carr*, 13 Bush (Ky.) 215, therefore, does not apply.

Upon the whole information, we think it appears that there was a wilful misuser and non-user by the Eel River Railroad Company of its franchises in regard to matters which go to the essence of the contract between the corporation and the State; that the Cass Circuit Court had jurisdiction of the subject-matter of the action and the persons of the defendants, and that there was no defect of parties. The demurrers of the appellants were properly overruled.

(4) Were the appellants entitled to judgment on the special findings of the jury? The findings of fact closely pursued, and fully sustained, the allegations of the information, and it is not necessary to set them out. Special answers separately filed by the appellants set up the defense that the cause of action did not accrue within fifteen years before the commencement of the action. The verdict finds that on the 6th day of October, 1887, the lease mentioned in the information was executed, and that thereupon the Eel River Railroad Company surrendered the absolute control and possession of its railroad, its equipments, and franchises to the Wabash Western Railway Company. Nothing is said in the special finding concerning the execution of a lease in 1879, or at any date other than October 6, 1887. But if a previous lease had been made, the execution of another instrument of like character by and between the same parties, or their successors, in 1887, may have annulled or merged the former agreement, and it undoubtedly had the effect of a new and substantive violation of the

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duties and obligations of the Eel River Railroad Company. The State had the right to challenge the validity of this lease, and to demand a forfeiture of the franchises of the corporation on account of its execution and the subsequent proceedings of the two companies under it. The information was filed May 1, 1893, less than six years after the lease was executed, and, as to the Eel River Railroad Company, the action was commenced February 13, 1896. But we think the bar of the statute of limitations does not, in civil actions, apply to the State, nor, as a general rule, is its right of action lost by laches upon the part of its officers. §305 Burns 1894; *Pennsylvania Co. v. State*, 142 Ind. 428; *Commonwealth v. Erie Road*, 27 Pa. St. 339, 360; *State, ex rel., v. Halter*, 149 Ind. 292; *County of Schuylkill v. Commonwealth*, 36 Pa. St. 524.

Besides, we think the misuser of the franchises of the Eel River Railroad Company constituted a continuing wrong. *Peck v. City of Michigan City*, 149 Ind. 670; *Gunder v. Tibbits*, 153 Ind. 591.

The special findings of fact were entirely consistent with the general verdict, and there was no error in overruling appellants' motion for judgment in their favor.

(5) Upon a careful examination of all the reasons for a new trial discussed by appellants' counsel, we are satisfied that the action of the court in overruling the motion was correct. We think the verdict and the special findings were sustained by sufficient evidence, and were in accordance with the law; that no error was committed in giving, or refusing to give, instructions; and that the court did not err in refusing to compel the jury to answer interrogatories numbered fifteen and sixteen filed by appellants.

In determining the questions arising upon the decision of the court on the motion for a new trial, we do not deem it necessary to take them up in detail, or to extend this opinion by comment upon their merits. The views we have expressed upon the controlling questions in the cause suffi-

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ciently indicate our reasons for the rulings upon this branch of the case, and we regard these reasons as decisive of the several points made under this assignment of error.

(6) The statute expressly authorized the appointment of a receiver in the event that judgment was rendered against the corporation. The judgment, in case of a forfeiture, is that the franchise be seized into the hands of the State, and that the corporation be dissolved. 2 Kent's Com. 300-305; *State Bank v. State*, 1 Blackf. 267; *Ryan v. Vanlandingham*, 7 Ind. 416.

The appointment of a receiver to take possession of the property of the company was necessary and, in the exercise of its general powers, we think the court was authorized to make such appointment. It was asked for in the information, and no harm could result from the appointment as a part of the proceedings in the cause. Had it not been made until *after* judgment, the court would doubtless have had the right to make the appointment on the motion of the prosecuting attorney, and without further notice. A correct result having been reached, we do not think the action of the court should be disturbed, or that any reason exists for a modification of its judgment.

Judgment affirmed.

MANUFACTURERS GAS AND OIL COMPANY ET AL. v.
THE INDIANA NATURAL GAS AND OIL COMPANY.

[No. 19,263. Filed June 28, 1900. Rehearing denied Nov. 23, 1900.]

MINES AND MINERALS.—Natural Gas.—Property Rights.—Increasing Natural Flow.—Injunction.—Natural gas in the ground is so far the subject of property rights in the owners of the superincumbent lands, that, while each of them has the right to bore or mine for it on his own land, and to use such portion of it as, when left to the natural laws of flowage, may rise in the wells of such owner and into his pipes, no one of the owners of such lands has the right, without the consent of all the other owners, to induce an unnatural flow into or through his own well, or to do any act with reference

155	461
155	545
155	547
156	682
155	461
162	396

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to the common reservoir, and the body of gas therein, injurious to, or calculated to destroy it, and an action may be maintained by the owners of superincumbent lands to enjoin another owner from using devices for pumping, or any other artificial process, that shall have the effect of increasing the natural flow of gas.

From the Grant Circuit Court. *Reversed.*

Rollin Warner, A. W. Brady and W. A. Ketcham, for appellants.

W. O. Johnson, M. Winfield, Foster Davis, J. C. Blackledge, C. C. Shirley and Conrad Wolf, for appellee.

DOWLING, J.—In this suit the appellants sought to enjoin the appellee from using devices for pumping, and from employing any other artificial process or appliance for the purpose, or having the effect of increasing the natural flow of gas from the wells of the appellee, or through the pipes conveying and transporting the same.

The ruling of the court sustaining a demurrer to the complaint is the error assigned.

The appellants, the Manufacturers Gas and Oil Company, the Manufacturers Fuel Company, the Ball Brothers Glass Manufacturing Company, the Swayzee Glass Company, the Crystal Window Glass Company, and the Alexandria Window Glass Company, are corporations organized under the laws of this State, as is also the appellee, the Indiana Natural Gas and Oil Company. The complaint states that the two corporations first named are engaged, among other things, in supplying natural gas to manufacturing companies carrying on business at Muncie, Delaware county, Indiana, in which large amounts of capital are invested, and by whom 1,600 men are employed and paid, the value of the annual output of which is \$3,500,000; that the pipe lines of the said Manufacturers Gas and Oil Company extend to, and some of its wells are situated at, a point about nine miles northwest of the city of Muncie, and fifteen miles from one of the lines and from some of the wells of the appellee in Grant county; that the pipe lines and

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some of the gas wells of the Manufacturers Fuel Company extend north from the city of Muncie about seven miles to about eighteen miles from the lines and wells of the appellee; that the Ball Brothers Glass Manufacturing Company has an annual output of \$1,500,000, and that it employs 1,200 men, with a pay-roll of \$42,000 per month; that the lines through which it is supplied with gas extend north from the city of Muncie about eleven miles to within a distance of about eighteen miles of the lines and wells of the appellee. Similar allegations are made as to the Swayzee Glass Company, the Crystal Window Glass Company, and the Alexandria Window Glass Company. It is further stated that each of the said manufacturing establishments requires a large quantity of fuel to enable it to carry on its operations; that natural gas is more desirable than any other kind of fuel, and that the plants of the said appellants were located and built especially with reference to the supply of natural gas in their vicinity, and are entirely dependent upon it. It is alleged that the appellee is engaged in the business of mining, collecting, and transporting natural gas from the natural gas fields in Indiana to the city of Chicago, in the state of Illinois, and that in the conduct of its said business it has established pipe lines for the transportation of natural gas through a great part of the counties of the State from Howard county to the northwestern boundary of the State, and that for the purpose of transporting such natural gas it has established, and is maintaining, one pumping station in the county of Jasper, and one in the county of Howard, and that it is intending and threatening, and, unless restrained by the court, it will establish another in the county of Grant, where it has located and drilled wells, and laid pipe lines connecting with its main pipe line to Chicago.

That, underlying the counties in the northeastern and central part of Indiana, there was discovered, in the year 1886, a great reservoir of natural gas, located in the Trenton

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rock, at various distances from the surface of the earth, the counties of Delaware, Madison, and Grant, being located over the center of said reservoir, and said reservoir extending in every direction from the three counties aforesaid, and underlying the whole of Blackford, and parts of Jay, Wells, Howard, Tipton, Hamilton, Hancock, Henry, and Randolph counties, the supply of gas being greatest in the counties of Delaware, Grant and Madison; that said reservoir of natural gas is single, continuous, connected, and limited, situated in the Trenton rock underlying said several counties, and parts of counties, at a depth of from 900 to 1,000 feet below the surface of the earth; that the said Trenton rock is a porous substance which permits the passage of natural gas through it; that said gas is confined in said rock at a great pressure, which has diminished from 325 pounds in 1886 to 165 pounds at the present time; that because the said reservoir is continuous, connected, and limited, any diminution, waste, destruction, or injury to any part of said reservoir decreases the entire supply of natural gas, and diminishes the pressure of all natural gas wells drawing from said reservoir, thereby injuring all other parts of the said reservoir; that beneath and around said reservoir is a vast body of salt water, which also is confined, and is subject to great pressure, and which, as the pressure on said reservoir of natural gas decreases, or is diminished, constantly tends to enter the said reservoir, and the wells drilled therein, and to destroy the same; that when the pressure within the said reservoir shall decrease to about 100 pounds, the effect will be to permit said body of salt water to enter said entire reservoir, and to destroy the same, with all the natural gas wells entering therein, or drawing thereon; that the gas wells of the appellants will be rendered entirely useless and worthless if the said reservoir is destroyed; that for this reason it is of the utmost importance to the appellants, and to all other manufacturing institutions in said gas districts, that no excessive, un-

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authorized, or unlawful use of said natural gas be made or permitted; that the appellee has located, and drilled, and draws natural gas from, a great number of natural gas wells in Grant and Howard counties, and has leased many thousands of acres of land in said Grant and Delaware counties, whereon it has not yet drilled wells, but it expects, intends, and gives out that it will drill gas wells on said lands; that much of the land so leased, for the purposes aforesaid, lies in the immediate vicinity of the said wells owned by the appellants, respectively; that all of said wells already drilled by the appellee penetrate to, and draw from, said reservoir of natural gas, and all wells hereafter drilled upon said leased land will penetrate, and draw upon, the said reservoir; that the appellee, in violation of the rights of the appellants, and in violation of section two of an act entitled "An act to regulate the mode of procuring, transporting, and using natural gas, and declaring an emergency," which became a law by lapse of time, without the Governor's approval, March 4, 1891, has used, is using, and threatens to continue to use, artificial processes, or appliances, for the purpose, and which have the effect of increasing the natural flow of the natural gas from its wells through the pipes used for conveying and transporting the same, by maintaining and using at points in the counties of Jasper, Howard, and Grant, pumping stations, and other devices to the appellants unknown, by which the natural gas while being transported is forced into its mains and pipes at a pressure of 400 pounds to the square inch, and largely beyond the natural rock pressure of the natural gas at the wells; that by the use of such devices the back pressure upon the reservoir, which is essential to keep the salt water from entering the wells, and destroying the natural gas, is withdrawn, and the flow of gas from the wells, and in the pipes, is greatly increased, and the supply and pressure of gas in the reservoir greatly diminished, to the prejudice of the appellants, and of all

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other manufacturing interests in and throughout the said district; that in so forcing the gas through such pipe lines by such artificial processes, the appellee has drawn, and is continuing to draw, so heavily through its said wells upon the said reservoir as seriously to diminish the supply and pressure of gas therein, and to draw from the wells owned by the appellants and other manufacturers in said district the supply of gas upon which they are dependent for their continued operation; that, unless the appellee is restrained from piping said natural gas by pumping and other artificial appliances for the purposes and having the effect of increasing the natural flow of gas from any well, and of increasing and maintaining the flow of natural gas through the pipes used for conveying and transporting the same, the appellants and all other manufacturing interests located in the said gas district will suffer irreparable injury, their said wells will be wholly destroyed, and rendered entirely worthless, the value of their property will be destroyed in whole or in part, and they will be compelled to close down, and discharge their employes until such time as they can refit and reestablish their plants for the use of coal, and that even then the value of their property will be greatly diminished, etc.

The relief demanded is, that the appellee be perpetually enjoined and restrained from using devices for pumping, or any other artificial process or appliance, for the purpose or that shall have the effect of increasing the natural flow of natural gas from any of its wells, and from increasing and maintaining the flow of natural gas through the pipes used for conveying and transporting the same.

The sufficiency of the complaint, and the right of the appellants to an injunction, are denied by the appellee, and the grounds relied upon by appellants for relief are vigorously assailed.

Counsel for appellee contend (1) that while natural gas in the ground may not be susceptible of absolute private

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ownership, or the subject of ordinary property rights, yet, when brought to the surface and placed in pipes for transportation, it becomes private property, and an article of commerce; that all rights in, to, and over it, as such property, are entitled to the same measure of protection as is granted to the owner of oil, coal, or wheat on the cars; and that the State has then no right to prohibit or restrict its use; sale, or transportation; (2) that the Supreme Court of this State, having recognized natural gas when brought to the surface of the earth and placed in pipes as private property and a commercial commodity, and the appellee having invested its means upon the faith of those decisions, the appellants are precluded by the doctrine of *stare decisis* from the relief they seek, even if those decisions should now be regarded as erroneous, and overruled; (3) that, if the acts of 1889 and 1891 should be held valid, and the former decisions construing them overruled, a court of equity cannot now grant relief by way of injunction, because of *laches* on the part of the appellants; (4) that the appellants show no such individual interest or dominant right in the natural gas while in the ground, nor any such special injury different from the injury to the public, as will authorize them to maintain this action; (5) that the appellants do not show clearly their right in the *res*, that such right has been invaded, or is threatened, and that their right is dominant and superior to that of the appellee, and (6) that under the acts of the legislature, which have been held valid, and under the decisions of the Supreme Court of this State, in reference to the act which was held invalid, it has been settled that gas, when mined, is the property of the person producing it, and that the legislature cannot prohibit its sale or purchase within or beyond the State.

Whatever pertinence and force the *first*, *second*, *third*, and *sixth* objections, and the arguments founded upon them, might have if the grievance complained of was the transportation and sale of natural gas beyond the State by the ap-

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pellee, they cannot be regarded as important or influential in the present case, for the reason that such transportation and sale are not the grounds of the action. The wrongful act stated, and sought to be enjoined, is the use by the appellee of pumping machinery, and other appliances for the purpose, and having the effect, of increasing the flow of gas from its wells into its pipes. The question to be determined here is not whether natural gas, when reduced to possession, is property, but as to the right of well owners to use certain extraordinary means to reduce it to possession.

In the examination of the subject, it is proper and necessary to consider whether the appellants have, or can have, a property interest in natural gas while in the earth, and before it is reduced to possession; whether the appellants will sustain a special injury by the threatened acts of the appellee different from the injury to the public; and whether the acts of the appellee invade an equitable right of the appellants.

Natural gas is a fluid mineral substance, subterraneous in its origin and location, possessing, in a restricted degree, the properties of underground waters, and resembling water in some of its habits. Unlike water, it is not generally distributed, and, so far as now understood, it can be used for but few purposes, the most important being that of fuel. Its physical occurrence is in limited quantities only, within circumscribed areas of greater or less extent.

If it could be dealt with as subterranean waters, there would be little difficulty in determining the rules by which the rights of landowners, and other persons interested in it, should be governed. But the difference between natural gas and underground waters, whether flowing in channels or percolating the earth, is so marked that the principles which the courts apply to questions relating to the latter are not adapted to the adjustment of the difficulties arising from conflicting interests in this new and peculiar fluid.

Natural gas being confined within limited territorial

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areas, and being accessible only by means of wells or openings upon the lands underneath which it exists, is not the subject of public rights in the same sense, or to the same extent, as animals *ferae naturae*, and the like, are said to be. Without the consent of the owner of the land, the public cannot appropriate it, use it, or enjoy any benefit whatever from it. This power of the owner of the land to exclude the public from its use and enjoyment plainly distinguishes it from all other things with which it has been compared, in the use, enjoyment and control, of which the public has the right to participate, and tends to impress upon it, even when in the ground in its natural state, at least in a qualified degree, one of the characteristics or attributes of private property. In the case of animals *ferae naturae*, fish, and the like, this public interest is said to be represented by the sovereign or State. So, in the case of navigable rivers and public highways, the State, in behalf of the public, has the right to protect them from injury, misuse, or destruction. But in the case of natural gas, there are reasons why the right to protect it from entire destruction while in the ground should be exercised by the owners of the land who are interested in the common reservoir. From the necessity of the case, this right ought to reside somewhere, and we are of the opinion that it is held, and may be exercised, by the owners of the land, as well as by the State. Natural gas in the ground is so far the subject of property rights in the owners of the superincumbent lands, that while each of them has the right to bore or mine for it on his own land, and to use such portion of it as when left to the natural laws of flowage may rise in the wells of such owner and into his pipes, no one of the owners of such lands has the right, without the consent of all the other owners, to induce an unnatural flow into, or through, his own wells, or to do any act with reference to the common reservoir, and body of gas therein, injurious to, or calculated to destroy it. In the case of lakes, or flowing streams, it cannot be said that any

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particular part, or quantity, or proportion of the water in them belongs to any particular land or riparian owner, each having an equal right to take what reasonable quantity he will for his own use. But the limitation is upon the manner of taking. So, in the case of natural gas, the manner of taking must be reasonable, and not injurious to, or destructive of, the common source from which the gas is drawn. The right of each owner to take the gas from the common reservoir is recognized by the law, but this right is rendered valueless if one well owner may so exercise his right as to destroy the reservoir, or to change its condition in such manner that the gas will no longer exist there.

This view of the law is sustained by the recent decision of the Supreme Court of the United States in the case of *Ohio Oil Co. v. State of Indiana*, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. ed. 729. In that opinion, the court say: "Although in virtue of his proprietorship the owner of the surface may bore wells for the purpose of extracting natural gas and oil, until these substances are actually reduced by him to possession, he has no title whatever to them as owner. That is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession. It is also clear from the Indiana cases cited that, in the absence of regulation by law, every owner of the surface within a gas field may prosecute his efforts and may reduce to possession all or every part, if possible, of the deposits without violating the rights of the other surface owners.

"If the analogy between animals *ferae naturae* and mineral deposits of oil and gas, stated by the Pennsylvania court and adopted by the Indiana court, instead of simply establishing a similarity of relation, proved the identity of the two things, there would be an end of the case. This follows because things which are *ferae naturae* belong to the 'negative community'; in other words, are public things,

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subject to the absolute control of the State, which, although it allows them to be reduced to possession, may, at its will, not only regulate but wholly forbid their future taking. *Geer v. Connecticut*, 161 U. S. 519, 525. But whilst there is an analogy between animals *ferae naturae* and the moving deposits of oil and natural gas, there is not identity between them. Thus, the owner of land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from his property; so, also, the owner may not follow the natural gas when it shifts from beneath his own to the property of some one else within the gas field. It being true as to both animals *ferae naturae* and gas and oil, therefore, that whilst the right to appropriate and become the owner exists, proprietorship does not take being until the particular subjects of the right become property by being reduced to actual possession. The identity, however, is for many reasons wanting. In things *ferae naturae* all are endowed with the power of seeking to reduce a portion of the public property to the domain of private ownership by reducing them to possession. In the case of natural gas and oil no such right exists in the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field. This difference points at once to the distinction between the power which the lawmaker may exercise as to the two. In the one, as the public are the owners, every one may be absolutely prevented from seeking to reduce to possession. No divesting of private property under such a condition can be conceived, because the public are the owners, and the enacting by the State of a law as to the public ownership is but the discharge of the governmental trust resting in the State as to property of that character. *Geer v. Connecticut*, *supra*. On the other hand, as to gas and oil, the surface

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proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a coequal right in them all to take from a common source of supply the two substances which, in the nature of things, are united, though separate. It follows from the essence of their right, and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of the others, or by waste by one or more, to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right, and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them of their privilege to reduce to possession, and to reach the like end by preventing waste. This necessarily implied legislative authority is borne out by the analogy suggested by things *ferae naturae*, which, it is unquestioned, the legislature has the authority to forbid all from taking, in order to prevent them from undue destruction, so that the right of the common owners, the public, to reduce to possession may be ultimately efficaciously enjoyed. Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the State of Indiana, which is here attacked because it is asserted that it divested private property without due compensation, in substance, is a statute protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others. Indeed, the entire argument, upon which the attack on the statute must depend, involves a dilemma which is this: If the right of the collective owners of the surface to take from the common fund, and thus re-

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duce a portion of it to possession, does not create a property interest in the common fund, then the statute does not provide for the taking of private property without compensation. If, on the other hand, there be, as a consequence of the right of the surface owners to reduce to possession, a right of property in them, in and to the substances contained in the common reservoir of supply, then as a necessary result of the right of property, its indivisible quality, and the peculiar position of the things to which it relates, there must arise the legislative power to protect the right of property from destruction. To illustrate by another form of statement, the argument is this: There is property in the surface owners in the gas and oil held in the natural reservoir. Their right to take cannot be regulated without divesting them of their property without adequate compensation, in violation of the fourteenth amendment, and this although it be that, if regulation cannot be exerted, one property owner may deprive all the others of their rights, since his act in so doing will be *damnum absque injuria*. This is but to say that one common owner may divest all the others of their rights without wrongdoing, but the lawmaking power cannot protect all the owners in their enjoyment without violating the Constitution of the United States. * * *

“In view of the fact that regulations of natural deposits of oil and gas and the right of the owner to take them as an incident of title in fee to the surface of the earth, as said by the Supreme Court of Indiana, is ultimately but a regulation of real property, they must hence be treated as relating to the preservation and protection of rights of an essentially local character. Considering this fact and the peculiar situation of the substances, as well as the character of the rights of the surface owners, we cannot say that the statute amounts to a taking of private property, when it is but a regulation by the State of Indiana of a subject which especially comes within its lawful authority.”

The surface proprietors have the right to reduce to pos-

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session the gas found beneath. They could not be *absolutely* deprived of this right without a taking of private property. But there is a coequal right in all of such owners to take the gas from the common source of supply. The use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of others. From these considerations, the Supreme Court of the United States held that the legislature derived the power to protect all the collective owners, by securing a joint distribution, to arise from the enjoyment by them of their privilege to reduce to possession. It declares the act of 1893 to be a statute protecting *private property*, and preventing it from being taken by one of the common owners without regard to the enjoyment of the others. A right of property in all the surface owners in the gas contained in the common reservoir of supply is recognized, as is also the constitutional legislative authority to protect the right of property from destruction. The final conclusion of the court is that one common owner of the gas in the common reservoir can not divest all the others of their rights without wrongdoing.

The acts of 1891 and 1893 are an express recognition by the legislature of the qualified ownership of the common owners in the gas in the common reservoir, and any act therein forbidden may be, according to the circumstances, the subject of a suit at law, or a proceeding in equity, by the person injured, as well as the foundation of a public prosecution. Independently, however, of any statute, for the reason already stated, the common owners of the gas in the common reservoir, separately or together, have the right to enjoin any and all acts of another owner which will materially injure, or which will involve the destruction of the property in the common fund or supply of gas. Acts 1893, p. 300; *State v. Ohio Oil Co.*, 150 Ind. 21; *Del Monte Min. Co. v. Last Chance Min. Co.*, 171 U. S. 55, 60, 18 Sup. Ct.

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895, 43 L. ed. 72; *Brown v. Spilman*, 155 U. S. 665, 15 Sup. Ct. 245, 39 L. ed. 304; *Jamieson v. Indiana Natural Gas & Oil Co.*, 128 Ind. 555, 12 L. R. A. 652; *Townsend v. State*, 147 Ind. 624, 62 Am. St. 477, 37 L. R. A. 294; Acts 1891, p. 89; *Hibberd v. Slack*, 84 Fed. 571, 579. There is something in the nature of unity in their possession of the gas in the reservoir. 2 Black. Com. 182.

It is charged in the complaint that the appellee is using in two wells owned by it, and threatens to use in others, pumping machinery and other devices by which the natural flow of the gas is greatly increased, and that the effect of the use of such machinery and devices is to remove the back pressure by which the gas is confined in the Trenton rock, and a vast body of salt water, lying underneath and surrounding the reservoir, is prevented from rushing into the reservoir and destroying it, and putting an entire stop to the flow of natural gas therein. Certainly, such acts are destructive of the common interests in the gas and reservoir, and the threatened injury is a proper subject of relief by injunction.

It does not appear from the complaint that there has been unreasonable delay on the part of the appellants in seeking relief, and it is clearly shown that they have a special interest in the gas in the ground, and a right to protect it from injury or destruction by the methods and appliances proposed to be used by the appellee in removing it from the common reservoir into its pipes. The facts stated in the complaint constitute a cause of action, and the demurrer to it should have been overruled. Judgment reversed, with instructions to overrule the demurrer, and for further proceedings in accordance with this opinion.

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162 806**THE INDIANAPOLIS WATER COMPANY v. KINGAN & COMPANY, LIMITED.**

[No. 18,706. Filed November 27, 1900.]

QUIETING TITLE.—*Eminent Domain.—Easements.—User.—Canals.—Riparian Owners.*—In the construction of a canal from Broad Ripple to Indianapolis, under the acts of 1835 and 1836 (Acts 1835, p. 25, Acts 1836, pp. 14, 15), the board of internal improvements built a dam across White river and constructed a levee along the bank, extending up the river about a mile. The dam set back the water for a distance of more than four miles, and widened the river on each side more than thirty feet, on an average, and boats loaded with grain or wood were occasionally taken from the canal through the locks onto the river above the dam, and thence poled to various points. Plaintiff, a riparian owner, brought suit against defendant, who had succeeded to the rights of the canal, to quiet title; defendant produced proof of a continuous flowage since 1838. *Held*, that user by flowage evidenced no broader claim than a right of flowage, and that such a right is a mere easement.

From the Marion Circuit Court. *Affirmed.*

W. A. Ketcham, Albert Baker and Edward Daniels, for appellant.

W. H. H. Miller, J. B. Elam and J. W. Fesler, for appellee.

BAKER, J.—Complaint by appellee to quiet title. Answer, general denial. Trial by court. Special finding of facts and conclusions of law. Judgment quieting title in appellee. Motion for a new trial overruled. Errors are assigned on the conclusions of law and the refusal of a new trial.

The assignments present but one question, and that arises on these facts: White river runs through Marion county. It is non-navigable, and the title of adjoining proprietors extends to the thread of the stream. *Ross v. Faust*, 54 Ind. 471, 23 Am. Rep. 655. Between 1829 and 1836 the legislature passed various statutes to provide for the con-

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struction of public canals which should be free highways. A "board of internal improvements" was created to carry on the work in behalf of the State. In 1838 the board constructed a canal from Broad Ripple to Indianapolis within Marion county. The canal bed was dug through dry land. To supply it with water the board built a dam eight feet high across White River at Broad Ripple. At this point the right bank of the river was low, and so a levee was constructed extending from the abutment of the dam up the river about a mile and varying from forty to two hundred feet from low-water mark. The dam set back the water for a distance of more than four miles and widened the river on each side more than thirty feet on an average. The board constructed locks between the canal bed and the river above the dam. After the canal was in operation, boats for carrying freight and passengers were run upon the canal, by horse-power on the towpath, between Broad Ripple and Indianapolis. Occasionally boats, loaded with grain or wood, were taken from the canal through the locks onto the river above the dam and thence were poled to various points and were returned by the same route to Indianapolis. Above the dam no horse-power was used. Before the canal was built flat-boats, pirogues and canoes were operated for the carriage of grain and wood on the river from above the dam's location to Indianapolis. This canal was never extended above Broad Ripple. If it had been, the four miles of backwater would probably have been used as a link in the water highway between Indianapolis and the next canal above the dam. In 1850 the State, having abandoned its scheme of internal improvements, sold this canal, with all the appurtenances and privileges pertaining to it, to one Conwell. The deed is set out in *Indiana Central Canal Co. v. State*, 53 Ind. 575. By mesne conveyances appellant, a company engaged in furnishing the city and citizens of Indianapolis with water, has succeeded to the rights of Conwell. The dam, levee and canal have been maintained and

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continuously possessed by appellant and its grantors from the time of the original construction to the present date. Appellee claims to own certain lands on the river, above the dam, within the limits of the backwater, and extending to the thread of the stream. Appellee produced a chain of title, in which appellant finds no flaw, and which entitles appellee to all the rights of a riparian owner, unless the construction of the dam and the facts connected therewith as above stated deprive appellee of those rights.

The parts of the statutes, conferring power on the board to acquire land and take materials and secure privileges necessary to construct the canal and appurtenances, are as follows: By section four of the act of 1835 (Acts 1835 p. 25) it is provided that "in all cases where applications for damages growing out of the construction of the Wabash and Erie Canal, or the works connected therewith, have been made or shall be made, for any lands, timber or stone, or other materials which may have been taken for the construction of said canal under the provisions of the laws of this State; or for any lands, timber, stone, or other materials, which may be taken under authority of the laws in force, for the location or completion of said canal, or any of the structures thereto appertaining, the claims shall be filed with the board." The duties of the board and of the appraisers and the proceedings in making the appraisement are prescribed, and the appraisers are required "to make an equitable assessment of the damage (if any) which the respective claimants may have sustained, over and above the benefits conferred by the construction". And it is made the duty of the board to pay the awards to the individuals, "which shall vest the fee-simple of the premises so appropriated in this State." By section sixteen of the act of 1836 (Acts 1836 p. 14) it was provided that it should be lawful for the board, and each of its members, by themselves or by superintendent, agent or engineer, to "enter upon and take possession of and use all and singular any lands,

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streams and materials of any and every description necessary for the prosecution and completion of the improvements contemplated by this act; and to make all such canals, feeders, dams, locks, railroads, turnpike roads, and other works as they may think necessary for making said improvements, avoiding in all cases unnecessary damage or injury to the proprietors." By section seventeen it is provided that if persons feel aggrieved "by the construction of any of the works contemplated by this act, or by the use of materials for the same," they shall make out a written statement of the cause of complaint and deliver it to the member of the board having the superintendence of that part of the public works which is supposed to occasion such injury, which shall be laid before the board at its next semiannual meeting, and which the board shall refer to three appraisers to be named by the board, the decision of the appraisers to be final unless an appeal be taken to the circuit court within thirty days after the decision. And "the appraisers, the court or jury, shall take into consideration the benefits resulting to such complainant from the construction of the works which occasion the supposed injury." Sections eighteen and nineteen read: "Sec. 18. The said board of internal improvements shall, by any one or more of its members, proceed in due time along the lines of the said several works herein contemplated, and take from the several individuals through whose lands any of said contemplated works may pass, or which may be contiguous thereto, releases to the State of the necessary land, timber, stone, sand, or other material, for the purposes of constructing any or all of said works, or for repairing the same, and for building-ground for the construction of mills or other hydraulic machinery to be propelled by the water power of any such canal, and also to enter and purchase, on behalf of the State, any lands belonging to the general government or to individuals contiguous to such work for the same purpose, and file the same in the office of the Secretary of State; which releases shall

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operate so as to vest in said State a full and complete right to enter upon, use, and take the same at any and all times thereafter." "Sec. 19. Said board, or any member as aforesaid, in taking releases as aforesaid, is hereby authorized, in consideration of any privilege granted by individuals to the State of the right of way or other privilege, to contract with such individual, on behalf of the State, to erect across said canal any bridge or bridges for the benefit of such individual and the public."

In *Water Works Co. v. Burkhardt*, 41 Ind. 364, the question whether the State, by appropriation proceedings under the power of eminent domain, acquired an easement or a fee simple absolute in the bed of this canal now owned by appellant, was under consideration. The land in dispute was owned by one West at the time of the appropriation on behalf of the State. The court said, page 366: "The board of internal improvements, for the purpose of constructing the central canal, and to procure a right of way therefor, appropriated a strip of land through said real estate, and constructed thereon the bed of said canal, its banks, margins, and towpaths. West's damages, occasioned by such appropriation, were assessed, as provided by law, and paid to him as follows: September 30, 1837, \$700, and February 25, 1839, \$250. The board of internal improvements entered upon the strip of land so appropriated, and constructed upon it the bed, banks, margins, and towpaths of the canal." The questions to be decided were stated thus, page 369: "We have really only to determine what power the legislature possessed to appropriate the property, and what interest or estate was appropriated." The conclusion of the court on the first branch of the question is well expressed in the words of Denio, J., in *People v. Smith*, 21 N. Y. 595, quoted with approval on page 371: "The necessity for appropriating private property for the use of the public or of the government is not a judicial question. The power resides in the legislature. It may be exercised by

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means of a statute which shall at once designate the property to be appropriated and the purpose of the appropriation; or it may be delegated to public officers, or, as it has been repeatedly held, to private corporations established to carry on enterprises in which the public are interested. There is no restraint upon the power, except that requiring compensation to be made." In the present case it is observable that the legislature did not designate the property to be appropriated, but delegated the selection to public officers. The statutes were inoperative as to any particular tract until designated by the board. Over the board's determination of the necessity of any appropriation, the courts have no control. On the second branch of the question, namely, what estate the board acquired for the State by appropriating property under their delegated power of eminent domain, the court on pages 376 to 386 decided in substance that section four of the act of 1835 was not repealed in terms, nor impliedly, by the act of 1836; that the acts were to be construed *in pari materia*; that, since section seventeen of the act of 1836 was silent as to the estate acquired by condemnation proceedings, the court would look to section four of the act of 1835; that, since section four provided that payment of the award of damages should "vest the fee simple of the premises so appropriated in the State", evidence that particular land was taken by the board under the power of eminent domain would establish title in fee simple absolute in the State and its grantees.

This decision has been followed in *Nelson v. Fleming*, 56 Ind. 310; *Cromie v. Trustees, etc.*, 71 Ind. 208; *City of Logansport v. Shirk*, 88 Ind. 563; *Brookville, etc., Co. v. Butler*, 91 Ind. 134; *Shirk v. Board, etc.*, 106 Ind. 573; *Frank v. Evansville, etc., R. Co.*, 111 Ind. 132; *Blair v. Kiger*, 111 Ind. 193; *Quick v. Taylor*, 113 Ind. 540; *Collett v. Board, etc.*, 119 Ind. 27, 4 L. R. A. 321; *Peoria, etc., R. Co. v. Attica, etc., R. Co.*, 154 Ind. 218. In all these

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cases except the last two, the court has expressed its reluctance in following the Burkhart decision, and has declared its unwillingness to extend the doctrine by construction beyond cases in which the State's grantee claims under the board's exercise of the power of eminent domain. But the court has never failed to abide by the Burkhart decision as a rule of property to the full extent of the holding that evidence of the board's exercise of the power of eminent domain established title in fee simple absolute.

Take, for example, the cases of *Brookville, etc., Co. v. Butler*, 91 Ind. 134, and *Blair v. Kiger*, 111 Ind. 193. In the Brookville case the canal was constructed through a piece of low ground in such a manner that there was a proper bank on one side of the excavated channel and not on the other. On this latter side the water spread over the remainder of the low ground and formed a pond. The suit, begun more than twenty years after the canal was dug, involved the title in fee to the ground on which the pond was formed. It was held, in substance, that the canal proprietor, claiming by virtue of an appropriation made by the State under the power of eminent domain, need not affirmatively show, after such a lapse of time, that compensation had actually been paid; that the flowage of water beyond the excavated channel did not evidence an appropriation, under the power of eminent domain, of the fee in the flooded land; that the right of flowage is merely an easement; that evidence of the fact of flowage for twenty years establishes of itself nothing more than a prescriptive right to such an easement. In the Blair case the canal crossed a creek at right angles. The canal was not carried over the creek in a viaduct, but crossed in it, so to speak. A dam was built and this formed one of the banks of the canal. The dam was of such a height as to raise the water in the creek to the level desired in the canal on each side. Guard-gates were put in the canal at each end of the dam, so as to regulate the flow from the creek into the canal in each

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direction. The water of the creek was thus used to keep the water in the canal at the required level. While the dam constituted one bank of the canal, there was no bank opposite to it; and there could be none, else the construction of the canal at that point would be defeated. Before they built the dam, the board entered upon and made a survey of the land required for carrying the canal across the creek in this manner, and cut down and burned the timber on the surveyed tract. Guard-banks were constructed up each side of the creek for the purpose of forming a basin. It was held that "the basin was constructed as a part of the canal, and the land was appropriated for that purpose"; and that, under the *Burkhart* case, the appropriation vested the fee in the canal proprietor.

While the *Burkhart* case holds that section four of the act of 1835 was not repealed by the act of 1836, it does not decide that the act of 1835 limits, modifies, or controls sections eighteen and nineteen of the act of 1836; it does not decide that the board could proceed only by exercising the power of eminent domain; it does not decide that, if the board proceeded by contract, they could not purchase a less estate than a fee simple where they desired gravel or timber, or that, if they needed the right of flowage, they could not act by paying for less than the value of the fee, including the value of the riparian rights. Section eighteen required the board, before commencing work, to proceed along the line and procure "releases" for necessary lands and materials, "which releases shall operate so as to vest in said State a full and complete right to enter upon, use, and take the same at any and all times thereafter". Manifestly, it was intended that condemnation should not be resorted to except in case of failure to reach satisfactory agreements with owners. Section nineteen authorized the board, "in consideration of any privilege granted by individuals to the State of the right of way or other privilege, to contract with such individual, on behalf of the State, to erect across said

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canal any bridge or bridges for the benefit of such individual and the public". The expressions, to enter upon and use land, to take materials, to secure grants of right of way, to secure other privileges, all indicate an easement and not a fee simple absolute. So it is clear that the board, if they chose to contract for an easement, had the power to do so.

In the present case, as already stated, appellee produced evidence, sufficient on its face, to establish its rights as a riparian proprietor. Against this, appellant produced nothing but proof of a continuous flowage since 1838. Outside of the building of the dam and levee, there was neither a taking nor a possession of the banks of the river above the dam except by the raising of the water in the river—a necessary result of building the dam. After possession for twenty years, the conclusive presumption arises of a grant or right ample enough to protect the possession. "A prescriptive right can never be broader than the claim evidenced by user." *Brookville, etc., Co. v. Butler*, 91 Ind. 134; *Quick v. Taylor*, 113 Ind. 540; *Peoria, etc., R. Co. v. Attica, etc., R. Co.*, 154 Ind. 218. The user by flowage evidenced no broader claim than a right of flowage; and such a right is a mere easement. *Edgerton v. Huff*, 26 Ind. 35; *State v. Pottmeyer*, 33 Ind. 402; *Julien v. Woodsmall*, 82 Ind. 568; *Brookville, etc., Co. v. Butler*, 91 Ind. 134; *Board v. Indianapolis Natural Gas Co.*, 134 Ind. 209.

Judgment affirmed.

BOARD OF COMMISSIONERS OF MONROE COUNTY v.
CONNER.

[No. 18,758. Filed November 27, 1900.]

GRAVEL ROADS.—*Injunction.*—*Counties.*—An action will not lie to enjoin the board of county commissioners from letting a contract, under the provisions of §§6924-6933 Burns Supp. 1897, for the construction of a free gravel road, because of irregularities in the election, since an adequate legal remedy is given by §7859 Burns 1894, granting an appeal from the action of the board of commissioners in such cases. pp. 485-493.

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STATUTES.—*Reënactment.*—*Construction.*—Where a statute has been construed by the courts of the State, and the same is substantially reënacted, the legislature adopts such construction, unless the contrary is clearly shown by the language of the act. p. 496.

From the Monroe Circuit Court. *Reversed.*

J. E. Henley and J. B. Wilson, for appellant.

R. W. Miers, Edwin Corr, H. C. Duncan and I. C. Batman, for appellee.

MONKS, J.—This is an appeal from a judgment enjoining appellant from letting a contract for the construction of two free gravel roads in Bean Blossom township, under the provisions of §§6924-6934 Burns 1894 (Acts 1893, p. 196), as amended by the act of 1895, §§6924-6933 Burns Supp. 1897. (Acts 1895, p. 143.)

The errors assigned call in question the sufficiency of the complaint. It appears from the complaint that appellee was, at the commencement of the action, a voter and taxpayer of the township in which the free gravel roads were about to be constructed. The following reasons were alleged why appellant should be enjoined:

“(1) The inspector of said election at precinct number one was ineligible to serve as such, because a large claim for damages had been allowed him by the reviewers of said road, and he was thereby interested in the result of said election.

“(2) Because Edward O. Wampler, one of the judges of the election at precinct number one, was neither a freeholder, nor a householder.

“(3) The election officers at said precinct fraudulently counted in favor of the building and improvement of each of said roads, forty votes, which were legally cast against the building and improvement thereof, thereby changing an actual majority of the legal votes cast at said election against the building and improvement of each of said roads, to an apparent majority in favor of the building and improvement thereof. That said election officers in said

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165	375
155	484
166	189
167	203
167	438
167	467
168	18

155	484
169	60
169	76
169	171
170	164
170	618

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precinct fraudulently failed to count a large number of legal votes which were cast against the construction of each of said roads, as cast. That a majority of the legal voters in said township, at said election, voted against the building and construction of each of said roads, but the election officers in said precinct number one fraudulently returned said votes, and changed the returns of said election so as to show an apparent majority in favor of the building of each of said roads, which said result was certified to the board of commissioners of said county."

The act of 1893 (Acts 1893 p. 196, §§6924-6934 Burns 1894) as amended by the act of 1895 (Acts 1895 p. 143, §§6924-6933 Burns Supp. 1897), provides for the construction of free gravel roads on the petition of fifty freeholders, citizens of the township or townships where the roads proposed to be constructed are located, the question to be submitted to the voters of said township or townships, at an election to be called by the board of commissioners of the county.

Appellee brought this action to enjoin appellant from letting a contract for the construction of certain free gravel roads under the provisions of said act of 1893, as amended in 1895.

The settled rule in this State is, that a person is not entitled to relief by injunction or writ of mandamus, if there is another adequate remedy. *Board, etc., v. Dickinson*, 153 Ind. 682, 686 and cases cited; *State v. Real Estate, etc., Assn.*, 151 Ind. 502, 503, and cases cited.

If, therefore, there was another adequate remedy for the grievances alleged in the complaint, the court erred in overruling the demurrer thereto.

The first section of said act, §6924 Burns Supp. 1897 (Acts 1895, p. 143), provides that "the vote on said question shall be certified by the proper officers of said election to the board of county commissioners of the county, and if at said election a majority of those voters [voting] on said

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question are in favor of building such road or roads, the commissioners shall at once proceed to the construction of the same, but not otherwise."

The act of 1889 (Acts 1889 p. 276) being §§6953-6959 Burns 1894, provides for the purchase of toll roads, on petition of fifty freeholders, citizens of the township or townships where said toll road is located, the question to be determined by the voters of said township or townships, at an election to be called by the board of commissioners of the county. It is provided in the first section of said act of 1889, being §6953, *supra*, "The vote on said question shall be certified by the proper officers of said election to the county commissioners, and if at any such election a majority of those voting on said question are in favor of said purchase, the commissioners shall make said purchase, but not otherwise."

We find on examination of said act of 1889, and the act of 1893 and the amendment of 1895, that they are substantially the same, except that the first named act provides for the purchase of toll roads, while the last named act provides for the construction of free gravel roads. It is evident that the provisions of the acts of 1893 and 1895, concerning the taxing district, the petition, notice of election, election, issuance of bonds, and levy of taxes to pay the bonds, and the powers of the board of commissioners, and all other essential provisions, are copied from said act of 1889.

In *Gilson v. Board, etc.*, 128 Ind. 65, 11 L. R. A. 835, the appellant, a resident taxpayer of the township in which the toll road was located, commenced an action to enjoin the board of commissioners from levying a tax as provided in section five of said act of 1889 to pay the principal and interest of the bonds issued by the board of commissioners under section three of said act, in payment for the toll road purchased under the provisions of said act of 1889. The court said: "The statute before us confers upon the board

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of commissioners of the county exclusive original jurisdiction to receive and pass upon the sufficiency of the petition, the sufficiency of the report made by the persons appointed to ascertain the consideration to be paid for toll roads, the sufficiency of the notice of election, and the result of the election. In passing upon these questions the board of commissioners acts in a judicial capacity. These matters must all be passed upon by the board before the order for the purchase of the road is entered. When the order for the purchase of the road is made these questions are, therefore, conclusively adjudicated. Objections to the petition, notice, appraisement, or regularity of the election, must be made, if made at all, before the final order for the purchase of the road is entered by the board of commissioners. *Jackson v. State*, 104 Ind. 516; *Peters v. Griffee*, 108 Ind. 121; *McMullen v. State*, 105 Ind. 334; *Young v. Sellers*, 106 Ind. 101; *Million v. Board, etc.*, 89 Ind. 5; *Dewey v. State*, 91 Ind. 173; *Stoddard v. Johnson*, 75 Ind. 20; *Osborn v. Sutton*, 108 Ind. 443; *Ely v. Board, etc.*, 112 Ind. 361; *White v. Fleming*, 114 Ind. 560; *Strieb v. Cox*, 111 Ind. 299; *Black v. Thompson*, 107 Ind. 162; *Hobbs v. Board, etc.*, 116 Ind. 376; *Board, etc., v. Hall*, 70 Ind. 469; *Reynolds v. Faris*, 80 Ind. 14; *Hilton v. Mason*, 92 Ind. 157; *Hill v. Probst, etc.*, 120 Ind. 528; *Loesnitz v. Seelinger*, 127 Ind. 422.

“Under the authorities above cited it must be held that the questions involving the sufficiency of the petition, the regularity of the report of those appointed to appraise the road, the sufficiency of the notice of election, and the regularity and result of such election, are questions which were adjudicated by the board of commissioners of Rush county before entering an order for the purchase of the toll road named in the complaint, and, having been so adjudicated by that tribunal, they are not subject to an investigation in a collateral proceeding like this.”

In *State, ex rel., v. Board, etc.*, 131 Ind. 90, appellant

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brought an action to compel appellee, by mandamus, to complete the purchase of a toll road, after appellee had, notwithstanding the election was in favor of the purchase, entered an order refusing to make said purchase. The court held that mandamus would not lie to compel the board to make an order for the purchase, for the reason that the board in such case acts judicially. That the remedy was an appeal under §7859 Burns 1894, §5772 R. S. 1881 and Horner 1897.

In *Dayton Gravel Road Co. v. Board, etc.*, 131 Ind. 584, a proceeding for the purchase of a toll road under the act of 1889, *supra*, before the board of commissioners, a final order was made refusing to purchase the toll road. From this order an appeal was taken to the circuit court. Afterwards that court on motion dismissed the appeal, on the ground that there was no appeal in such a proceeding from the decision of the board of commissioners. This court held that appellant had the right to appeal from the order of the board of commissioners refusing to purchase said toll road under §7959 (5772), *supra*, and reversed the judgment, with instructions to overrule the motion to dismiss the appeal in said cause.

The act of 1869, and the amendments thereof (Acts 1869 p. 97, §§5340-5357 Burns 1894, §§4045-4062 R. S. 1881 and Horner 1897), authorizing counties and townships to aid in the construction of railroads, by taking stock in, and making donations to the same, is, in many respects, substantially the same as the act of 1889, and the act of 1893 as amended in 1895. It provides for a petition, notice of election, and an election, to be called by the board of commissioners, and the power of the board to subscribe the stock or make the donation depends upon the vote at said election. Said act requires the proper officers of said election to make a statement of the whole number of votes cast, and the number for the appropriation to the railroad company, and the number against it. Section twelve of said act, being

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§5351 Burns 1894, §4056 R. S. 1881 and Horner 1897, provides that, "If a majority of the votes cast shall be in favor of such railroad appropriation, the board of county commissioners, at its ensuing regular June session, shall grant the prayer of said petition, and shall levy a special tax of at least one-half the amount specified in said petition," etc.

It has been uniformly held by this court under said act, that when the board of commissioners entered an order either granting the prayer of said petition, or refusing to grant the prayer thereof, that said order is not subject to collateral attack, by injunction or writ of mandamus, but the only remedy is an appeal under §7859 Burns 1894, §5772 R. S. 1881 and Horner 1897. *Hill v. Probst*, 120 Ind. 528; *Hilton v. Mason*, 92 Ind. 157; *Goddard v. Stockman*, 74 Ind. 400; *Brokaw v. Board, etc.*, 73 Ind. 543; *Board, etc., v. Hall*, 70 Ind. 469; *Faris v. Reynolds*, 70 Ind. 359; *Jones v. Cullen*, 142 Ind. 335; *Pittsburgh, etc., R. Co. v. Harden*, 137 Ind. 486; *Bell v. Maish*, 137 Ind. 226.

In *Goddard v. Stockman*, *supra*, the appellant sued to enjoin the collection of a tax, levied under said act of 1869, to aid in the construction of a railroad. One of the objections to the validity of the tax was, that ten persons who voted for the appropriation were not legal voters of the township, so that upon the legitimate vote there was a majority of nine against the appropriation. The court said: "There is obvious necessity that the will of the people in the matter of aiding in the construction of a railroad, as expressed at the polls, should in some way be authoritatively ascertained once for all. If left open to every taxpayer, in a suit brought at his own pleasure, to go behind the returns of the officers of election and the determination of the county board, a measure supposed to be of public importance can not be securely accomplished. * * * As was said in *Shideler v. Clinton Township*, 23 Ind. 479, 'In such

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a case, public safety required that the determination shall be conclusive.' * * * In this case there was not only an official return of the vote by the sworn officers of election, but the county board made a finding that the majority of the voters at the election were in favor of the appropriation. Against these views the counsel for the appellant say: 'It has, however, never been the duty of any court or tribunal to pass upon the legality of these votes. When the ten illegal voters offered to vote, all the board of judges could do was to require the oath and affidavit required by §21, 1 R. S. 1876, p. 439, and then, by §22, they must receive the vote. They acted in a ministerial and not a judicial capacity. When the board of canvassers met and organized, all they could do was, as commanded by statute, §10, 1 R. S. 1876, p. 738, to "carefully compare and examine the papers, and shall prepare and sign a statement of the whole number of votes cast, and the number for such appropriation to the railroad company and the number against it." No power to hear evidence or purge the polls is given them. The statute further provides (§11) that this statement shall be filed with the auditor, and recorded, and by §12, that, "If a majority of the votes cast shall be in favor of such railroad appropriation, the board of county commissioners, at their ensuing regular June session, shall grant the prayer of said petition." There is no provision made for any trial, any adversary proceedings or the hearing of any evidence, other than the statement filed by the board of canvassers with the auditor.' If convinced of the truth of these views, and that the appellants have never had any legal means of contesting the election, or the return thereof made by the canvassers, we should feel compelled to sustain the appeal and to hold that a remedy could be had by injunction. But we entertain a different view of the law. The statute expressly gives to any person aggrieved by any decision of the board of county commissioners a right of appeal therefrom to the circuit court. This right

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is not confined to the formal parties to the procedure, but any one, not a party, may show his interest by affidavit and have the appeal. The law for contesting elections is not applicable to elections such as this was, but, nevertheless, there was a practicable way open for making an efficient contest. The law is not, that, if a majority of votes returned be in favor of the appropriation, the board shall grant the prayer of the petition, but, if a majority of the votes cast shall be in favor of such railroad appropriation, the county commissioners, at their regular ensuing June session, shall grant the petition. This means the legal votes cast, and the board has the right to go behind the canvass of the vote and inquire into the truth of the return made; and any individual interested may appear before them and contest the result of the election, and, if aggrieved at the decision of the board, take his appeal to the circuit court. * * * *Brokaw v. Board, etc.*, 73 Ind. 543, and cases cited."

It is evident from an examination of the provisions of said act of 1893, as amended by the act of 1895, concerning the construction of free gravel roads, that, under said act, as under the act of 1869, authorizing counties and townships to aid in the construction of railroads, it is the majority of the legal votes cast at the election that controls the action of the board of commissioners, and not the majority returned by the officers of the election. It is clear, therefore, from what was said in the case of *Goddard v. Stockman, Treas.*, 74 Ind. 400, that the board of commissioners of Monroe county had the right to go behind the vote as returned by the election officers, and inquire into the truth of the same, and that appellee had the right to appear before said board, at the proper time, and contest the result of said election as returned by the officers thereof, and present any proper objections contained in his complaint in this action for an injunction, and if aggrieved by the decision of the board, take an appeal to the circuit court.

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If the board of commissioners in granting or refusing to grant the prayer of the petition for the purchase of toll roads under the act of 1889, *supra*, and in granting or refusing to grant the prayer of the petition to aid in the construction of railroads, under the act of 1869, *supra*, exercises powers of a judicial character as decided by this court, it is clear beyond controversy that the board acts in the same capacity under the act of 1893, *supra*, as amended in 1895. In *Board, etc., v. Reeves*, 148 Ind. 467, 471, it was held that the board did exercise powers of a judicial character in granting or refusing the petition under said act of 1893 as amended. See, also, *Board, etc., v. Harrell*, 147 Ind. 500, and cases cited.

Counsel for appellee insist, however, that "the board of commissioners has no jurisdiction. That when a majority vote for the construction of the road they have but one duty, and that is to go ahead and construct the road. The vote is certified by the proper officers of such election, and the board can not so much as determine whether or not a majority has voted for or against the road. That there is nothing before the board which requires the exercise of any judicial function. That, therefore, no appeal could be taken under §7859 (5772), *supra*, from the action of the board, ordering the construction of said road." The rule declared by this court in regard to appeals from the decisions of the board of commissioners is, that if the decision of the board is judicial in its character, an appeal lies therefrom, under §7859 (5772), *supra*, unless the right of appeal is denied expressly, or by necessary implication, by the statute under which the decision is made. If the decision is made in the exercise of merely administrative, ministerial or discretionary powers, no appeal lies therefrom unless the statute in express terms authorizes an appeal from such decision. *Board, etc., v. Davis*, 136 Ind. 503, 505, and cases cited; *Potts v. Bennett*, 140 Ind. 71.

As we have shown, this court in *Goddard v. Stockman*,

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74 Ind. 400, decided against the contention of appellee that the board had no power to go behind the return of the votes by the election officers, and held that the board had such power and also the power to hear and try objections thereto, and ascertain and adjudge the number of legal votes cast. In *Grusenmeyer v. City of Logansport*, 76 Ind. 549, a petition was presented to the board of commissioners for the incorporation of a town under §§4314-4322 Burns 1894, §§3293-3301 R. S. 1881 and Horner 1897. The city of Logansport filed objections thereto, which were sustained, and the board of commissioners ordered that said petition be dismissed. The petitioner appealed to the circuit court, where, on motion of the said city of Logansport, the appeal was dismissed by the court on the ground that "the law allowed no appeal from such decision of the board of commissioners." The act for the incorporation of towns §§4314, 4322(3293-3301), *supra*, under which said proceedings were brought, provides that if the requirements of the statutes have been complied with, the board of commissioners shall make an order declaring that the territory described, with the assent of the qualified voters thereof, as set forth in said act, be an incorporated town by the name specified in the petition, and shall fix a time and place within said territory within a month thereafter for an election, to determine whether such territory shall be an incorporated town, and give ten days' notice thereof. It is provided that the election officers shall make a statement showing the whole number of votes cast, and the number for and against said incorporation, and return the same to the board of commissioners, who, if the majority of the votes cast be in favor of such incorporation, and if satisfied of the legality of such election, shall make an order declaring said town has been incorporated by the name adopted, which order shall be conclusive of such incorporation in all suits by or against such corporation. Appellee in that case, as a second proposition against the right of appeal, claimed that the power to incor-

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porate towns was legislative and that the board in such case exercised a legislative discretion, and that from the exercise of such power there is no appeal. The court in answer to this contention said "The second proposition of the appellant [appellee] is disposed of by *Taylor v. City of Ft. Wayne*, 47 Ind. 274. The board has no discretion to grant or refuse the application, if the proper preliminary steps have been taken by the petitioners. The decision of the board in such a case is judicial, and not merely administrative or legislative." The court held that there was an appeal from the decision of the board in said case, saying: "We hold, therefore, that under §31 [§7859 Burns 1894, §5772 R. S. 1881 and Horner 1897] of the general law, there is an appeal from any decision of a judicial character, made by a county board in any proceeding, unless the right is denied expressly or by necessary implication. * * *

It can hardly be necessary to add that nothing is herein said or decided which can be construed to imply a right of appeal from the decisions of the boards upon matters of discretion."

There are many cases in this State, in addition to those already cited, holding that, where in a proceeding the board of commissioners have no discretion, but must grant the prayer of the petition, when the requirements of the statute have been complied with, and refuse the same when said requirements have not been complied with, that the decision of the board in granting or refusing the prayer of such petition is judicial in its character. *Board, etc., v. Markle*, 46 Ind. 96, 109-114, and cases cited; *Peele v. Board, etc.*, 48 Ind. 127; *State v. Boswell*, 50 Ind. 568; *State v. Needham*, 32 Ind. 325; *Bowen v. Hester*, 143 Ind. 511, 519; *White v. Fleming*, 114 Ind. 560, 572-576; *Million v. Board, etc.*, 89 Ind. 5, 12-15, and cases cited; *Stoddard v. Johnson*, 75 Ind. 20, 29, 30, and cases cited; *Cason v. Harrison*, 135 Ind. 330, 333-336, and cases cited; *Board, etc., v. Justice*, 133 Ind. 89, 92-93; *Strieb v. Cox*,

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111 Ind. 299, 304, 305, and cases cited; *Layman v. Hughes*, 152 Ind. 484, 486; *Ely v. Board, etc.*, 112 Ind. 361, 366-369, and cases cited; *Hobbs v. Board, etc.*, 116 Ind. 376, 381; *Forsythe v. City of Hammond*, 142 Ind. 505, 516-518, 30 L. R. A. 576, and cases cited; *Paul v. Town of Walkerton*, 150 Ind. 565, 570-575, and cases cited; *Woolverton v. Town of Albany*, 152 Ind. 77, 79, 80, and cases cited; *Argo v. Barthand*, 80 Ind. 63, 66, 67, and cases cited.

Moreover, it is a settled rule of statutory construction that when a statute or a part of a statute has been construed by the courts of the State and the same is substantially reenacted the legislature adopts such construction, unless the contrary is clearly shown by the language of the act. *Hiliker v. Citizens Street R. Co.*, 152 Ind. 86, 88; *Whitcomb v. Rood*, 20 Vt. 49; *The Abbottsford*, 98 U. S. 440, 25 L. ed. 168; Black on Interp. of Laws, 161, 162, and cases cited; Endlich on Interp. of Stat. §§367-369, and cases cited; Sutherland on Stat. Const. §333; Maxwell on Interp. of Stat. pp. 433, 434.

All the provisions of the act of 1869, *supra*, concerning giving aid in the construction of railroads, by counties and townships up to and including the order granting or refusing to grant the prayer of the petition, were substantially reenacted in the act of 1889 for the purchase of toll roads, and in the act of 1893, as amended in 1895, for the construction of free gravel roads. It follows, therefore, that the construction given to said act of 1869 in *Goddard v. Stockman*, 74 Ind. 400, and the other cases decided by this court before the said act of 1889, and the act of 1893 as amended in 1895, in regard to the right of the board of commissioners to go behind the return of the vote as made by the election officers, and the right of any party having an interest to appear and contest said result, as well as the right of appeal under §7859 (5772) *supra*, was adopted by the legislature in passing the last named acts.

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It follows that injunction will not lie in this case, for the reason that appellee had another adequate remedy. The court, therefore, erred in overruling the demurrer to the complaint.

Judgment reversed, with instructions to sustain the demurrer to the complaint, and for further proceedings in accordance with this opinion.

CONCURRING OPINION.

BAKER, J.—I concur because I believe less harm will result from holding that the question whether relief in annexation, railroad tax, and free gravel-road cases is to be sought by appeal, or by mandamus or injunction, even if wrongly decided at the start, is now definitely settled by the multiplied adjudications of this court and by the acquiescence of the legislature, than would flow from opening up the controversy in regard to the intrinsic-nature of the powers conferred upon and exercised by boards of commissioners in such cases.

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155	497
160	67

[No. 18,806. Filed November 27, 1900.]

MORTGAGES.—Delivery.—Deeds.—Priority.—One of the makers of a promissory note authorized the payee thereof to procure a loan for her from a person named, agreeing to execute a mortgage upon certain real estate and pay the proceeds thereof upon the note. The payee thereafter called at her residence with a note and mortgage which she executed and gave to the payee, who credited the amount thereof upon the note held by him, and, the next day, delivered the note and mortgage to the mortgagee, who gave him a check for the amount and filed the mortgage for record in the recorder's office of the county. Immediately after signing the mortgage the mortgagor signed and acknowledged a deed conveying the mortgaged premises to her step-granddaughter, who was a joint maker of the first note. *Held*, that the delivery of the mortgage was complete and effectual, and *eo instanti* became a valid lien upon the land.

From the Clinton Circuit Court. *Affirmed.*

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M. A. Morrison and Seabury Merritt, for appellants.

J. C. Farber, for appellee.

HADLEY, J.—Which in point of time was first delivered, a mortgage securing an indebtedness, or a deed conveying the legal title to the same lands? This is the real question presented by the record and is decisive of all. It arises under a motion for a new trial upon the ground that certain facts returned in the special finding relating to the delivery of the mortgage are not sustained by sufficient evidence and are contrary to law. This calls for a review of the special finding. A special finding must be construed as a whole, and not in fragmentary parts. Each part must be construed in connection with every other part relating to the same transaction, and, if taken as a whole, the finding legitimately supports the judgment, it must stand. *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348, 367, 22 Am. St. 593; *Brown v. Estate of Brown*, 2 Ind. App. 435, 438; Elliott's Gen. Prac., §973.

The rule which should guide an appellate tribunal in reviewing a special finding of facts by a court is the same as that which prevails with respect to a verdict of the jury. It is this: "Where the finding is supported by the evidence it will not be disturbed, but if entirely unsupported the finding will not be allowed to stand." Elliott's Gen. Prac., §979; *Devlin v. Quigg*, 44 Minn. 534, 47 N. W. 258, 20 Am. St. 592; *Davidson v. Morrison*, 86 Ky. 397, 407, 5 S. W. 871, 9 Am. St. 295.

There was evidence in support of these facts: August 8, 1893, Harriet H. Burget, hereinafter called Mrs. Burget, then in life, was the owner of the land in controversy. She and Harriett Merritt, her step-granddaughter and who lived with her on the farm in the same house, and hereinafter called Mrs. Merritt, had in 1889 become jointly indebted to Emanuel Burget on a promissory note for \$3,000, which note was due and unpaid. A few days before said August 8th, Emanuel Burget having solicited payment of

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his note, Mrs. Burget authorized Emanuel Burget to procure a loan for her of \$2,050 from Oliver Gard, and agreed to execute her note and mortgage on the land in controversy to secure the same, and that the money so procured should be all retained by said Emanuel Burget as a part payment of his \$3,000 note.

Whereupon, on August 8th, Emanuel Burget and Seabury Merritt, a notary public, called at the residence of Mrs. Burget and Mrs. Merritt, and Mrs. Burget signed a note for \$2,050, payable to Oliver Gard, and signed and acknowledged a mortgage on said land to secure said note, and, after completion of the instruments, handed the same to Emanuel Burget, who thereupon entered a credit on said \$3,000 note for \$2,050,—all with the full knowledge at the time of Mrs. Merritt, who had been made the beneficiary of said lands under the executed will of Mrs. Burget.

Within the following thirty minutes after the delivery of the note and mortgage to Emanuel Burget, Mrs. Burget signed, acknowledged, and delivered to Mrs. Merritt a deed conveying to her the legal title of the mortgaged premises, together with other real estate, and thus stripped herself of all property except a small amount of household goods; and upon the evening of the same day, August 8th, Mrs. Merritt, through the agency of Seabury Merritt, caused her deed to be recorded in the proper records of the county. Emanuel Burget held possession of the note and mortgage until the following day, August 9th, when he took them to the city of Frankfort, and presented them to Oliver Gard, who inspected them, and, finding them executed in due form, gave Emanuel Burget his check for \$2,050, and at once, August 9, 1893, filed the mortgage for record in the recorder's office of the county.

We have found no evidence in the record that Mrs. Burget actually delivered the mortgage to Gard, the nominal mortgagee, on August 8th, and before the execution of the deed to Mrs. Merritt as the finding states; nor do we deem such

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evidence or fact material. The essential question is, had Mrs. Burget, as mortgagor, in performance of her agreement with respect to the loan, intentionally placed the mortgage beyond her control, before she executed the deed to Mrs. Merritt?

Delivery becomes effectual when the grantor surrenders dominion of a complete instrument with intent thereby to make it operative. *Berry v. Anderson*, 22 Ind. 36, 39; *Somers v. Pumphrey*, 24 Ind. 231, 239; *Fewell v. Kessler*, 30 Ind. 195; *Hotchkiss v. Olmstead*, 37 Ind. 74, 84; *Nye v. Lowry*, 82 Ind. 316, 320; *Stokes v. Anderson*, 118 Ind. 533, 545, 4 L. R. A. 313; *Anderson v. Anderson*, 126 Ind. 62, 66; *Osborn v. Eslinger*, ante, 351.

It is important to bear in mind that, under the agreement, Emanuel Burget was to have all the money received from the loan for application upon his claim, and Mrs. Burget was to have only a credit for the amount upon her and Mrs. Merritt's note. Mrs. Merritt was jointly answerable for the debt to be discharged. The farm mortgaged was willed to her, and was liable for the debt whether as the property of Mrs. Burget, or ultimately as the property of Mrs. Merritt. Both were equally interested in the payment of the debt, one with a vested, the other with a prospective interest in the land. There was also evidence tending to show that Mrs. Merritt was the principal actor for her grandmother in arranging for, and in the consummation of the Gard loan, and had full knowledge of the execution of the mortgage at the time it was done, and at the time she accepted her deed, a few minutes later. And these two transactions, accomplished within the same hour, at the same place, and before the same officer, considered together, clearly indicate a purpose on the part of Mrs. Burget not only to provide for her debts, but to consummate by deed what she had intended by will, her design to confer the remainder of her estate upon her granddaughter. With this object in view Mrs. Burget signed and acknowledged the mortgage, and when

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thus in form a valid mortgage she handed it and the note to Emanuel Burget, without condition or reservation, unquestionably an intentional and as a final step in keeping her agreement with Burget, and then and there received from him all that she had bargained for, namely, a credit upon her obligation for the full amount of the note and mortgage. When this was done Mrs. Burget had received the full consideration for the mortgage, had received all that she was entitled to, and the one rendering her the consideration, with her full knowledge and approval, had received her note and mortgage, had acquired a vested interest in them, and, so far as she was concerned, the transaction was closed. Any further steps remained solely to Burget and Gard. What difference could it make to Mrs. Burget, after she became possessed of all she contracted for, when or how Burget and Gard settled as between themselves, whether upon the same or upon a subsequent day, or whether Burget received from Gard money, credit, a store, or a steam engine? Suppose Burget, in anticipation that Gard would replace it, had in the first instance advanced to Mrs. Burget the money on the mortgage, and she in turn had given it back to him in payment *pro tanto*, of her and Mrs. Merritt's note, could it be said in that case that she might keep the money and recall or abrogate the mortgage at any time before it reached the hands of Gard? In legal effect this is precisely what had been done when she delivered the note and mortgage to Burget and accepted from him the credit upon her obligation. When Mrs. Burget, having completed the note and mortgage, intentionally and unconditionally handed them over to Burget, in the execution of her purpose to secure the loan, and received from him the full consideration, the delivery was complete and effectual as to her and *eo instanti* became a valid lien upon the land according to the tenor of the mortgage.

There is abundance of evidence in support of the finding that Mrs. Burget was the owner of the land when she exe-

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cuted and delivered the mortgage for the purpose of securing the loan, and that, in point of time, the execution of the mortgage was prior to the execution of the deed to Mrs. Merritt. Upon these facts the judgment is clearly right, and if it is a matter of fact (as found by the court) and not a conclusion of law (which we deem unimportant to decide) that the mortgage was delivered to Gard August 8th, and before the execution of the deed, the inaccuracy in finding that the delivery was to Gard rather than to Emanuel Burget cannot injure the appellants, and is therefore no ground for reversal. *Platter v. Board, etc.*, 103 Ind. 360, 385; *Bothwell v. Millikan*, 104 Ind. 162, 164; *Slauter v. Favorite*, 107 Ind. 291, 300; *Sphung v. Moore*, 120 Ind. 352, 354.

We find no available error in the record. Judgment affirmed.

HELMS ET AL. v. BELL ET AL.

[No. 18,857. Filed November 27, 1900.]

COUNTIES.—*Commissioners' Court.—Collateral Attack.*—A judgment of a board of county commissioners establishing a highway is not subject to collateral attack unless it is void. *p. 504.*

SAME.—*Commissioners' Court.—Highways.*—The commissioners' court has power to establish highways, but the conditions and manner of its exercise being clearly defined by statute, and the court being one of special and limited jurisdiction, the statute must be strictly followed or the proceeding will be a nullity. *p. 504.*

SAME.—*Commissioners' Court.—Judgment.—Highways.*—A judgment of a board of county commissioners establishing a highway before the damages assessed were paid, as required by §6752 Burns 1894, is void, and the payment thirty days later did not render it valid. *pp. 506, 507.*

From the Hamilton Circuit Court. *Affirmed.*

I. W. Christian, W. S. Christian, R. K. Kane, T. E. Kane, T. J. Kane, F. E. Gavin, T. P. Davis and J. L. Gavin, for appellants.

R. R. Stephenson, Geo. Shirts and W. R. Fertig, for appellees.

155	502
157	89
155	502
159	581

155	502
170	82

Helms v. Ball.

HADLEY, J.—Appellant Helms and eleven others filed a petition before the board of commissioners of Hamilton county for the location of a highway over the lands of appellees. Viewers were appointed who reported in favor of the utility of the road; whereupon, appellees filed a remonstrance claiming damages, and also denying the public utility of the way. Reviewers were appointed who made their report finding the road to be of public utility, and assessing damages in favor of each of the appellees, which report of the reviewers was approved by the commissioners, who, thereupon caused a record of said road to be made, and entered an order that the same be opened and kept in repair; but the board found as a part the final order, that said highway was not of sufficient public importance or utility to justify the payment of the damages assessed out of the county treasury, and as a condition precedent to the opening of said road ordered that the petitioners pay the damages assessed. More than thirty days after the entry of the final order establishing said highway, the petitioners procured the payment into the county treasury, for the use of appellees, the remonstrators, the damages that had been assessed in their favor, and which they refused and still refuse to accept; whereupon appellant Sturdevant as auditor of the county, upon request of the petitioners, issued to appellant Morgan, as trustee of the township wherein the proposed road is situate, a warrant for the opening of said way, which trustee has delivered the warrant to Brandon as road supervisor of the district.

All the petitioners, the county auditor, township trustee, and road supervisor, are made defendants, and they are claiming and giving out in speeches that they have the right to and will open the way, and require the appellees to remove their fences, to their great and irreparable damage, etc.

These facts were held sufficient to entitle the plaintiffs, the remonstrators, to injunction, enjoining the defendants

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from opening said highway, and, the defendants refusing to answer, judgment was rendered against them upon their demurrer. The single question is did the court err in overruling the demurrer to the complaint?

The proceeding is a collateral attack upon what purports to be a judgment of the board of commissioners, and, to be successful, it must appear that the judgment is absolutely void. *Adams v. Harrington*, 114 Ind. 66, 71; *City of Indianapolis v. Consumers, etc., Co.*, 140 Ind. 246, 253; *Davis v. Clements*, 148 Ind. 605, 607; *Gold v. Pittsburgh, etc., Co.*, 153 Ind. 232, 241; *Winslow v. Green, ante*, 368.

The enforcement of a void judgment may be enjoined, and "a judgment is void if the thing essential to its validity is not apparent upon the face of the record, and it may be treated as a nullity by all persons, in collateral, as well as direct attacks." *Hudson v. Voreis*, 134 Ind. 642; *Strong v. Makeever*, 102 Ind. 578, 581; *City of Terre Haute v. Evansville, etc., Co.*, 149 Ind. 174, 176.

It is firmly settled that the commissioners' court is one of special and limited jurisdiction; that it has no power but that conferred by statute, and this it must employ in the mode prescribed. *Doctor v. Hartman*, 74 Ind. 221.

It has power to establish highways, but the conditions and manner of its exercise are clearly defined by the statutes and must be substantially observed, or the proceeding becomes a nullity. Section 6755 Burns 1894 provides that in the order for laying out of a highway the commissioners shall specify the width, and a failure to do so renders the judgment void. *Hudson v. Voreis, supra*; *White v. Conover*, 5 Blackf. 462.

In a proceeding under §6762 Burns 1894, to have a road that has been used for twenty years ascertained, described, and entered of record, a judgment of the commissioners failing to adjudge the user for twenty years is void as being a departure from the command of the statute. *Strong v. Makeever, supra*.

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A sale of county property by the commissioners under notice, as provided by §4248 R. S. 1881, which fails to state the terms of sale, is void for noncompliance with the statute. *Platter v. Board, etc.*, 103 Ind. 360, 376.

In the procedure for the location of a highway, when a petition properly signed and properly supported by notice is presented to the commissioners, the action they shall take upon the petition is clearly pointed out by the statute. They shall appoint viewers to inquire into and report to the court whether the proposed way will be of public utility. If the report of the viewers is in the negative, a judgment of denial must be entered, and that is the end of the proceeding; in such case there can be neither a review nor appeal to the circuit court. *McKee v. Gould*, 108 Ind. 107; *Bowman v. Jobs*, 123 Ind. 44.

And if the viewers shall report favorably to the public utility of the road, and there is no objection filed, the board shall make a record of the road and enter an order that the same be opened and kept in repair. But if objection is made for assessment of damages under §6746, and for inutility under §6750, the record and order for opening the way shall be suspended until the question of damages has been determined, and that of utility reconsidered by reviewers, and, if damages are awarded to objectors, the payment of the award presents to the commissioners the first and only discretionary subject that exists anywhere in the proceeding after assuming jurisdiction. *McKee v. Gould, supra*, 109.

Under §6748, in considering the payment of the damages assessed, if the board deems the proposed highway of sufficient importance to the public, they shall order the costs and damages paid out of the county treasury, and if of insufficient importance to the public they shall not order payment from the county treasury, and in which last instance they strip themselves of all power to make any provision for payment at all, and because of nonpayment they have no power to order the opening of the road.

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Section 6752 is as follows: "No such highway shall be opened, worked or used, until the damages assessed therefor shall be paid to the persons entitled thereto, or deposited in the county treasury for their use." The facts alleged bring this case within the principle here involved. The reviewers had reported in favor of the public utility of the road, and that each of the appellees was damaged in an amount stated. And in passing upon the report the commissioners approved the same, and entered an order that the road be spread of record and opened and kept in repair, and at the same time and in the same order adjudged that the road was not of sufficient importance to the public to justify payment of said damages out of the county treasury, and, further, that the petitioners pay the same as a condition precedent to the opening of the road. The statute gives the commissioners no power to adjudge payment of the damages against the petitioners, or any one else. When they had adjudged that the damages could not be paid out of the county treasury their power to proceed with the establishing of the road was suspended until actual payment of such damages had been made from some other source. When not payable out of the treasury it is proper for the petitioners or other persons to pay them. *Hayes v. Board, etc.*, 59 Ind. 552; *Board, etc., v. Small*, 61 Ind. 318.

And the effect of payment from any source upon the power of the commissioners to proceed in establishing the highway is stated in said §6748 thus: "And *when* payment of damages is made as herein provided, such highway shall be *recorded and ordered to be opened* and kept in repair as hereinbefore provided." That is to say, when the damages have been paid from some source to the use of the persons entitled thereto, and *not till then*, the commissioners have the right to proceed to record, that is, to enter final judgment, establishing the highway, and to order that the same be opened and kept in repair. Because the record shows that the commissioners in this instance entered final judg-

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ment ordering the recording and opening of the highway, before the damages assessed were paid, in violation of the positive inhibition of the statute, their judgment was clearly void.

The payment of the damages into the county treasury for the use of the appellees thirty days later gave no force to the final order. It was a nullity, and could be neither revived nor strengthened, and the issuance by the auditor to the township trustee of a warrant for the opening of the road was without effect. The judgment being void, its execution may be stayed by injunction.

Judgment affirmed.

HATTAWAY v. THE ATLANTA STEEL AND TIN-PLATE COMPANY.

[No. 18,869. Filed November 27, 1900.]

MASTER AND SERVANT.—*Personal Injuries.—Knowledge of Danger.*—

Plaintiff was employed in defendant's tin-plate factory in operating a plating machine, and, while passing a vat filled with oil which was used in connection with the machine, his foot slipped on the oily floor and he was thereby thrown into the vat of boiling oil and severely injured. It was shown by the special verdict that defendant's servants, who had been in its employ but a few weeks, had spilled the oil on the floor and had covered it with sawdust; that plaintiff had been in the service of the defendant, operating the plating machine for about two months and knew of the practice of using sawdust to absorb oil that had been spilled upon the floor. *Held*, that the condition of the floor and the open vat were as well known to the plaintiff as to defendant, and that plaintiff cannot recover for the injuries received. pp. 508-519.

MOTIONS.—*Appeal and Error.*—The action of the court in sustaining a motion for judgment in favor of defendant will not be disturbed on appeal because of a defect in the form of the motion where a correct result was reached. p. 519.

From the Hamilton Circuit Court. *Affirmed.*

R. K. Kane, T. E. Kane and T. J. Kane, for appellant.

J. C. Blacklidge, C. C. Shirley and Conrad Wolf, for appellee.

155	507
164	541
155	507
165	138

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JORDAN, J.—Appellant sued appellee to recover \$25,000 damages for personal injuries sustained while in its employ. A trial before a jury resulted in a return of a general verdict in his favor for \$3,000 with answers returned by the jury to numerous interrogatories. Appellee moved for judgment in its favor upon the findings of the jury under their answers to the interrogatories. This motion was sustained, and, over appellant's motion for a new trial, judgment was rendered in favor of appellee. The errors assigned in this appeal relate to the rulings of the court on these motions. It is alleged among other things in the complaint that defendant is a corporation engaged in manufacturing tin-plate in the town of Atlanta, Hamilton county, Indiana, and that plaintiff is by trade a tin-plate worker and has been engaged at such work since November, 1894. In the month of April, 1895, he was employed by the defendant to work in its said factory and mill as a plater to operate one of its plating stacks or machines. As a part of his duties it was necessary for him to clean his stack and scour the rolls therein on Saturday of each week, and in order to scour such rolls it was necessary to raise them out of the stack by means of a chain attached to the top of the rolls and passed through a pulley overhead and fastened to a windlass which was attached to the wall in the rear of the stack. It was also necessary to run the oil and metal, which would accumulate in the plating stack, into a receiving vat provided for that purpose for each one of the stacks so operated, said vat being three and one-half feet long, two feet wide, and two and one-half feet deep. This receiving vat was placed at the rear of each of the plating stacks, and was sunk into the ground to the depth of about two feet and was under the windlass and chain heretofore mentioned, the space intervening between the wall to which the windlass was attached and the edge of the vat was about three feet. It is further averred that in cleaning said machine a hook was used to turn the rolls and this hook was a necessary imple-

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ment in said business and was the only means for turning said rolls. There were four of the plating machines or stacks in the plating room of the defendant's factory, three of which were in operation, one being that at which plaintiff worked and was situated on the north side of the room. The other two were situated on the south side opposite to the machine operated by plaintiff. On Saturday, June 29, 1895, plaintiff in the discharge of his duties as an employe of the defendant was engaged in cleaning his machine, and for the purpose of cleaning it he had emptied or run the oil therein contained into the receiving vat heretofore mentioned, which vat was entirely open, uncovered and unprotected. He avers that there ought to have been a hook supplied to be used for the purpose heretofore mentioned for each one of the said machines, but upon the contrary there was but one of said hooks furnished for the use of all of the platers to be used by them in cleaning their stacks or machines. At the time and upon the occasion heretofore mentioned he went to the machine situated on the south side of the room to get this hook to use it in cleaning his machine, and thereupon discovered that it was not in its proper place in front of the machine, but had been placed in the rear thereof; that in order to procure the hook it was necessary for plaintiff to pass over the narrow space between the wall and the vat and under the chain and windlass fastened to the wall. The machine on the south side of the wall had just been cleaned in the manner heretofore stated, and the receiving vat in its rear was filled with hot oil and was uncovered and unprotected. The floor about this machine was completely covered with a layer of sawdust. In passing this vat the plaintiff, without any fault or negligence on his part, stepped on some oil which had been spilled on the floor by the side of said vat, which oil had been covered over with sawdust so as completely to conceal it from view, and in so stepping plaintiff slipped and fell into the hot oil contained in the vat in question and thereupon sustained the

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serious injuries of which he complains. It is further alleged that these injuries were sustained by plaintiff without any fault upon his part, and were wholly attributable to the negligence of the defendant in this, to wit: That the servants employed by it to operate the said plating machine, where the plaintiff was injured as aforesaid, were inexperienced workmen and without sufficient skill to operate said machine and were not familiar with its operations nor with the duties devolving upon them while engaged in the operation of the said machine, all of which was known to the defendant; that on account of the imprudence and unskilfulness of said employes caused by their inexperience and want of familiarity of their said duties so as to operate the said plating machine in a safe and proper manner, these employes permitted oil which had been spilled upon the floor to remain there, and instead of cleaning it up they covered it over with sawdust so as completely to conceal the same, all of which made it dangerous to go about said machine, and all of which was fully known to the defendant and unknown to the plaintiff when he slipped by reason of said oil and was thrown into said vat and injured as aforesaid alleged. The complaint, after describing the severity and character of the injury sustained by the plaintiff by falling into the oil vat in question, then proceeds to charge that the defendant ought to have furnished him with one of the hooks heretofore mentioned with which to perform the duties required. It is alleged that each of said plating machines ought to have been supplied with one of such hooks; that the plaintiff frequently requested the defendant to furnish him one of these hooks, and the defendant with each request promised to comply therewith but negligently failed to do so; that defendant also negligently failed to provide a covering for the vat into which plaintiff was thrown when he received his injury, and that it negligently permitted the said vat to remain open and uncovered, and by reason of the aforesaid respective acts of negligence on

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defendant's part, it is charged that the plaintiff has been permanently injured as heretofore shown. If the facts set forth in the complaint can be said to be averred in such a manner as sufficiently to disclose a cause of action by reason of the defendant's negligence, such cause must be attributed to the act of the defendant in the employing of unskilful and inexperienced servants to operate the stack or machine at which plaintiff was injured by being thrown into the oil vat situated near such machine. It is charged that these servants, by reason of their inexperience and lack of skill in the operation of their plating machine, permitted large quantities of oil to remain on the floor and covered the same over with sawdust so as to conceal its presence and thereby render it dangerous to go about said machine. This negligence, under the theory of the complaint, seems to be intended as constituting the *proximate* cause of plaintiff's injury. We are of the opinion that the insufficiency in the number of the particular hooks which were used in cleaning the stacks or machines in question, and the further fact that the vat into which plaintiff fell was uncovered, are not disclosed under the averments of the complaint to have such essential connection with the accident in controversy as to lend any material support to the particular and principal wrong of the defendant, which plaintiff in his complaint attributes to be the *proximate* cause of his injury. With this view of the complaint we may next inquire in respect to the facts found by the jury in their answers to the interrogatories submitted to them.

The facts disclosed by these special findings, among others, may be said to be substantially as follows: Plaintiff at the time of the accident was a young man of the age of twenty-two years endowed with ordinary intelligence. Plaintiff previous to the accident had been engaged elsewhere in the manufacture of tin-plate for about eight months, and prior to his injury he had been engaged in operating for defendant one of its plating machines for

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about two months. The defendant company for some months prior to the 29th day of June, 1895, the day upon which the accident occurred by which plaintiff was injured, had owned and operated a tin plate factory at the town of Atlanta, in Hamilton county, Indiana, in which the plaintiff had been employed to work for about a period of two months prior to said accident. The building in which he worked consisted of one large room extending lengthwise east and west. Through the center of this room ran an aisle about thirty feet wide. On either side of this aisle were a number of stalls or recesses extending from the aisle to the north and south walls of the building. These stalls were open at the ends next the aisle, but were closed on the other three sides. Above each of them and against the wall of the building was an open brick flue which served to carry off the fumes arising from the various plating machines used by the defendant in the tinning process. Each of these stalls was generally known as "a stack" and contained a tinning machine. This machine was placed lengthwise of the stack and was operated by two persons, the black or steel plates being fed into the same from one side and coming out on the other, thereby being plated with the tin through which it was made to pass. On the side from which these plates issued there was a large tank or vat four feet long, two feet wide, which was let into the floor a distance of eighteen inches or over and extended about six inches above the floor. This vat contained a quantity of oil used in the tinning process which was heated, when in the machines, to a very high temperature. When it became necessary to empty the machines of their contents in order to clean them, or for other purposes, the heated oil was drawn therefrom into the vats at the rear of each and then dipped back into the machine again as required. At the time plaintiff was injured the defendant's factory or mill contained four of these stacks or machines, two on each side of the aisle. Only three, however, were in operation, the one on the north side

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at which the plaintiff was employed and another immediately across the aisle where he received his injury, and the third just east of and adjoining the one last mentioned. The stack at which plaintiff was injured was used to manufacture a dull, heavy class of tin plate, and was known as the "lead stack" and also as stack number two, while that immediately east of it was known as stack number one, and the stack which plaintiff operated was known as stack number three. It was the custom of the defendant's factory for its employes, who operated these machines, to run the oil therefrom into the vats every Saturday afternoon and thoroughly clean the machines, including the rolls through which the tin plating is passed, which rolls are immersed, when the machine is in operation, in the boiling oil. The day plaintiff was injured was Saturday in the afternoon, and the three stacks in the room were in process of cleaning. The plaintiff, immediately before he was injured, had crossed the aisle to the lead stack for the purpose of securing an iron hook or wrench, which was used in throwing the rolls out of gear for the purpose of cleaning them. There was but one of these hooks supplied for the use of the three stacks. It was, however, only occasionally that this hook was required, it being needed for but a few minutes at a time at each one of the stacks for two or three times during the run of a week. In attempting to pass behind the vat situated at the lead stack in order to secure this hook, plaintiff's foot slipped on the greasy floor and thereby he was thrown into the vat of boiling oil causing the injuries of which he complains. At the place where he slipped the floor was covered with a quantity of sawdust to a depth sufficient to conceal the grease or oil under it. The jury found that it had been the custom in the defendant's factory to use and apply sawdust whenever grease or oil was spilled on the floor, which was a frequent occurrence in order to take up and absorb the same. The plaintiff at no time prior to the

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accident made any complaint to the defendant that the premises adjacent to the stack or machine where he was injured were unsafe, or that the floor was greasy or slippery, or that the vat or oil tank was uncovered. The oil which caused the plaintiff to slip was spilled on the floor about noon of the day plaintiff was injured. The place where it was spilled was exposed and the sawdust was in plain view, as was also the open vat near by containing the hot oil into which plaintiff was thrown. The place was lighted by light from a window, and there was nothing to prevent the plaintiff from seeing the sawdust which covered the oily floor, nor the open vat into which he fell. He was familiar with the premises, including the stack where he was injured, and he knew of the practice of using the sawdust for the purpose of absorbing the grease or oil that had been spilled upon the floor and that such sawdust was used upon the floor for no other purpose. At the time of the accident, two other servants of the defendant, to wit, Lloyd Harbit and Frank LeFever, were engaged in operating the plating machine or stack near which plaintiff was injured. This stack was in the same room where plaintiff worked, and about thirty-three feet from the machine which he was engaged in operating. These two employes had been in the service of the defendant operating this plating machine for about three weeks before the accident, and the plaintiff was well acquainted with them, and before the accident in question he was about the machine which they operated about once or twice in each week, and for the above period of time he was familiar with the manner in which they did their work, and no complaint was made by him to the defendant in respect to the incompetency or carelessness of either of these two employes. The practice of covering up oil spilled upon the floor, by the means of sawdust, had existed for two months before plaintiff was injured, but he made no complaint to the defendant nor gave it any information that such practice rendered the place where he worked more dangerous. An

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angle formed by the south and north wall of the room where these machines were operated was the usual place for keeping the tools and appliances used in and about stack number two where the plaintiff was injured. It was entirely safe, as the jury found, for the employes of the defendant to pass back and forth in front of the said machine to the corner or angle mentioned when necessary to obtain any of the tools used in connection with their work, and the wrench or hook for which plaintiff was looking, when injured, was one of the tools or appliances usually kept in the aforesaid angle or corner of the room, and the employes of the defendant, including plaintiff, had been frequently instructed to keep all tools and appliances, including said hook, in the angle or corner aforesaid mentioned when such appliances and tools were not in use. Plaintiff frequently, prior to his injury, went about the stack known as number two, while the same was being operated by Harbit and LeFever, for the purpose of securing this wrench or hook to be used in cleaning his machine. No accident prior to the one by which plaintiff was injured had occurred through the carelessness or incompetency of either said Harbit or LeFever. The jury find in their special findings that the immediate or *proximate* cause of plaintiff's injury was oil spilled on the floor and concealed by sawdust; that the omission which produced such cause was the act of Lloyd Harbit, one of the employes who operated machine number two; that he had spilled the oil about noon of the day plaintiff was injured, and had failed to clean or take up said oil so spilled by him on the floor.

We may properly assume that the jury by their general verdict find that the proximate cause of appellant's injury was the offspring of appellee's negligence, as charged in the complaint, and that appellant was himself free of contributory negligence and that he did not assume the risk of the danger due to such negligence; for upon such theory only could a general verdict in his favor have been returned. The facts, however, specially found and returned by the

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jury under their answers to the interrogatories, show that the proximate cause of plaintiff's injury was the oil spilled on the floor by Lloyd Harbit, a fellow servant who assisted LeFever in operating machine number two where appellant was injured; that the oil in question had been spilled by said Harbit about noon of the day upon which the accident happened. It further appears that appellant, before he sustained the injury in question, was frequently about the stack or machine operated by these two employes, and for a period of three weeks at least prior to the accident he was fully aware of the manner in which they performed their work, but made no complaint to the appellee in respect to the incompetency or carelessness, if any, of either of these servants, nor as to the condition of the floor adjacent to the stack which they operated. Appellant is shown to have been a man of mature age, of ordinary intelligence, and familiar with all of his surroundings. It is disclosed that for two months prior to the time of the accident, it was the practice in appellee's factory for the employes therein to throw sawdust on the floor where it had been rendered slippery by reason of the grease or oil which had accumulated thereon. The sawdust, as the jury find, was used for no other purpose except to cover up such greasy places on the floor, and such sawdust together with the open vats were exposed to the full view of appellant and his associates engaged at work in the factory. Appellant made no complaint, it is shown, to the appellee, nor did he give it any information that the practice of covering up such places upon the floor with sawdust rendered the same more dangerous. It is insisted by counsel for appellee that if it can be asserted that appellee was guilty of actionable negligence, upon the other hand it is conclusively disclosed by the special facts that this case falls within the rule of assumed risk upon the part of a servant, and consequently appellee is not liable for the injuries of which appellant complains. The material facts disclosed by the special findings, when considered and given their full force, are certainly irreconcilably in con-

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flict with the general verdict, and thereby may be said to destroy appellant's right to a judgment thereon. As shown, he, at least for a period of three weeks, was familiar with the methods employed by Harbit and LeFever and other employes of appellee in respect to covering over with sawdust the oil which had been spilled upon the floor. It would further seem that if he had employed the sense of seeing with which he was endowed, that he must have observed this sawdust upon the floor, for the jury find that he knew of the practice existing among appellee's employes of using such material for the purposes mentioned, and knew that it was used for no other purpose. He appears to have had full knowledge of these facts and of the condition of the floor around the machine operated by these two fellow servants. The condition of the floor with the sawdust thereon was as fully exposed to his view as it was to the appellee or any of its agents. Certainly then under the circumstances he must have been aware of any increased danger due to the use of the sawdust upon the greasy or oily floor. With the full knowledge of all this it appears that he made no complaint to appellee in regard to the peril due thereto, nor did he give any information to it in relation thereto, but seems to have voluntarily continued in its service.

We think that it may be asserted that the facts found conclusively disclose that the incompetency and carelessness, if any, of Harbit and LeFever, and the means employed by them of covering up and absorbing the oil upon the floor, and the condition of such floor as well as the open vat adjacent to the stack where these employes were engaged at work, were as open and as well known to appellant as such facts were known to appellee. Under such circumstances the law regards the master and the servant upon an equality. It is a well settled proposition that where the defects or danger in controversy connected with the particular service in which the employe is engaged are alike open to him and the master, that the latter is not liable for injuries resulting to the servant therefrom. If the former, under such cir-

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cumstances, without complaint, continues in the services of the master, he may be said to have assumed the risk due to such danger, and cannot recover for an injury resulting therefrom. *Louisville, etc., R. Co. v. Kemper*, 147 Ind. 561, and cases there cited; *Wabash R. Co. v. Ray*, 152 Ind. 392, and cases there cited. In this latter case on page 400 of the opinion in speaking of the doctrine of assumed risk we said: "An employe who has knowledge or who, by the exercise of ordinary diligence or observation, can learn of the infirmities, imperfections, or hazards of implements, machinery, or appliances with which he works, or the hazards of the premises where he performs the duties of his employment, and continues in the service without objections and without the promise of repairment or change upon the part of the master, will be deemed to have assumed all the risks incident to such defects and hazards, and thereby will be held to have waived his right to recovery for injuries resulting therefrom. While this rule can not be extended so as to cast upon the employe the duty to search for latent defects in the machinery, appliances, and instruments used by him, or about which he works, or the hidden dangers of places where he is engaged in the line of his duty, yet it does go to the extent of holding that he assumes the consequences resulting from such defects and dangers as are apparent to him or such as, by the exercise of ordinary diligence and by giving proper heed to his surroundings, he might have discovered. *Rietman v. Stolte*, 120 Ind. 314; *O'Neal v. Chicago, etc., R. Co.*, 132 Ind. 110."

When the facts disclosed in the special findings are tested by this rule of assumed risk upon the part of servants, it is evident that appellant is for this reason alone not entitled to a judgment on the general verdict, and that the court did not err in rendering judgment in favor of appellee upon the special findings. Much is said by appellant's counsel in their argument in regard to the insufficient number of hooks furnished by appellee at its factory for the purposes heretofore mentioned. The hook, however, for which appellant

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was in search when the accident occurred appears to have been nothing more than a remote incident in the chain of events leading up to the injury which he sustained, and under the circumstances it exerted no controlling influence over the case. A correct result under the facts having been reached by the court's ruling upon the motion for judgment in favor of appellee, there is no merit in the contention of appellant's counsel in respect to the form of this motion.

The judgment is affirmed.

TROXEL v. THOMAS ET AL.

[No. 18,988. Filed November 27, 1900.]

PARTIES.—Cancellation of Instruments.—A and B executed a note and secured same by a mortgage on a tile mill owned by them jointly. A purchased the interest of B in the mill and assumed and agreed to pay the note, but became insolvent and sold the mill to C and D, and, as a part consideration, took the note of the purchasers, payable when the note and mortgage on the mill were paid and satisfied. C sold his interest in the mill to D, who assumed all liability as to the last mentioned note. The mortgagee foreclosed the mortgage, and D, in order to protect his title in the mortgaged property, purchased the judgment. *Held*, that B and D had such a common interest as entitled them to join as plaintiffs in an action to cancel the note held by A and have the amount thereof applied upon the judgment. *pp. 520-523.*

HARMLESS ERROR.—Pleading.—Available error cannot be predicated on the action of the court in sustaining a demurrer to an answer where the facts averred in the answer were admissible in evidence under the general denial. *pp. 523, 524.*

APPEAL AND ERROR.—Assignment of Error.—Where defendants demurred separately to a cross-complaint, and the record shows that the court sustained "the demurrer" to the cross-complaint, available error cannot be predicated on such ruling if the cross-complaint was insufficient as to some of the demurrants. *pp. 524, 525.*

SAME.—Record.—Judgments.—Trial.—Submission.—The following entry appeared in the record on appeal: "Come the parties, by their attorneys, and on plaintiff's motion the court heard further testimony in this cause, to which the defendant excepts. The court, having heard the further testimony, and being advised in the premises, finds for the plaintiffs." *Held*, that it was sufficiently disclosed that there was a submission, trial and finding. *p. 525.*

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163	116

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From the Clinton Circuit Court. *Affirmed.*

O. E. Brumbaugh and Joseph Combs, for appellant.

T. H. Palmer and W. F. Palmer, for appellees.

JORDAN, J.—The relief sought to be obtained by appellees under the facts alleged in their complaint was the cancelation of a certain promissory note and an application of the amount of money which it represented to the payment of a certain judgment. A demurrer to the complaint for insufficiency of facts was overruled. The assignment of errors is based (1) upon the ruling of the lower court on a demurrer to the complaint; (2) sustaining the joint demurrer of appellees to the second paragraph of answer; (3) sustaining the separate demurrers of appellees to appellant's cross-complaint; (4) denying appellant's motion to set aside the judgment, and in overruling his motion for a new trial. An epitome of the facts set out in the complaint is as follows: On May 12, 1891, appellant, Troxel, and appellee Miller were owners of a certain tile and brick mill including all fixtures and appliances thereto belonging. On that date said Troxel and Miller executed their promissory note for \$400 to one Freeze, and, to secure this note, they executed to him a chattel mortgage upon the above tile and brick mill, which mortgage was duly recorded within ten days from the date of its execution in the recorder's office in Clinton county, Indiana, in which county the mortgaged property was situate, and wherein the mortgagors resided. Subsequently Miller sold and transferred all of his interest in said property to Troxel, and, as a part of the consideration for such sale and transfer, Troxel assumed and agreed to pay the note secured by the mortgage. Thereafter, on March 27, 1893, Troxel sold and transferred said property with the mortgage lien thereon to William C. Caldwell and James W. Thomas, the latter being an appellee in this case. As a part of the consideration of this latter sale, said

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vendees executed their promissory note to Troxel for \$400, which they promised to pay with interest at seven per cent. when the above chattel mortgage was satisfied and released, and, in the event it was satisfied before September 1, 1893, said note was to be due and payable on the last mentioned date. Thereafter, in 1894, Thomas purchased Caldwell's interest in the brick mill, and as a part of the consideration he assumed all liability in respect to the payment of the said last mentioned \$400 note. Troxel failed to pay the note secured by the chattel mortgage, and Freeze, the holder thereof, instituted an action in the Clinton Circuit Court against Troxel and Miller, and on February 13, 1895, recovered a judgment against both for \$560 on the note secured by said mortgage, and obtained a foreclosure of the mortgage in payment of said judgment. The appellee Thomas, in order to protect his title in the mortgaged property, was compelled to and did purchase this judgment from Freeze and secured from him an assignment thereof. This judgment, amounting to \$560, remained unpaid at the time of the commencement of this action, and Troxel as is shown is wholly insolvent. It is insisted by counsel for appellant that Miller and Thomas, plaintiffs below and appellees here, are, under the state of facts alleged in the complaint, shown to have separate causes of action against appellant, and therefore can not unite as plaintiffs in this suit, and for this reason alone it is contended that the demurrer to the complaint should have been sustained. It is the settled rule in this State that under our civil code all persons who unite as plaintiffs must have an interest in the subject of the action. But this rule is not to be interpreted so as to require that the interest of all the plaintiffs who do unite must be equal, or that such interest may not be legally severable. All, however, must have some common interest in respect to the subject-matter of the action, and each must be interested, at least to the extent that all who join as plaintiffs have some relief in respect to the subject-matter of such suit. Under

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these circumstances, such a unity of interests will be created in regard to the subject-matter of the particular action as will authorize parties so related in interest to join as plaintiffs. *Home Ins. Co. v. Gilman*, 112 Ind. 7, and cases there cited; *McIntosh v. Zaring*, 150 Ind. 301. Under the facts as heretofore set out, when tested by this rule, it is evident that appellees Miller and Thomas have such a unity of interests in this suit as will permit them to join as plaintiffs in this prosecution. It is disclosed that the \$400 note, executed to appellant by Thomas and Caldwell, by its terms could not become due and payable until the mortgage lien, which encumbered the property sold by appellant to them, had been satisfied and released. In fact it may be said to appear that the amount of money evidenced by this latter note represented the amount of the purchase money which Thomas and Caldwell retained and intended to hold until appellant had complied with his agreement with Miller, and satisfied the mortgage indebtedness. This obligation he failed to discharge, and, by reason of his insolvency, it would seem that he was not financially in position to comply with his said agreement. After the sale of the property by Troxel to Thomas and Caldwell, and after Thomas had become the sole owner thereof by his purchase of Caldwell's interest therein, and had assumed the payment of the \$400 note held by appellant, and judgment upon the mortgage indebtedness was recovered against Miller and appellant, the mortgaged property then owned by Thomas was decreed by the court to be sold in satisfaction of such judgment. It is further disclosed that Thomas, in order to prevent the enforcement of this decree and thereby protect his title to the property in question, was compelled to purchase the judgment recovered by Freeze against Miller and appellant on the mortgage indebtedness. Under these circumstances, it is evident that both Miller and Thomas were interested in having the amount of money evidenced by the \$400 note, executed by Caldwell and Thomas to Troxel, applied upon

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the judgment rendered in the foreclosure proceedings. Thomas was interested in having the amount of the \$400 note, the whole of which he had assumed and agreed to pay, applied in satisfaction of the judgment which he held against Miller and Troxel under the assignment from Freeze. Such credit being given upon a judgment, he was further interested in obtaining from Troxel a surrender of said note for the purpose of cancelation. Miller was also certainly interested in having the note so applied upon the judgment, and thereby being relieved from the liability of paying said judgment, as he would have been compelled to do on the failure of Troxel to pay it as he had obligated himself to do. There was no error in overruling the demurrer to the complaint upon the ground that the plaintiff had no interest in common in the prosecution. *McIntosh v. Zaring*, 150 Ind. 301; Bliss on Code Pl. §§73, 74.

Appellant answered the complaint in two paragraphs, the first being the general denial. By the second paragraph he admitted that he sold to Caldwell and Thomas a certain tile factory situate on certain described real estate in Clinton county, Indiana, for the price of \$1,100, \$400 of which was to be due and payable when the chattel mortgage, executed by him and Miller to Freeze, was released. He further admitted the foreclosure of said mortgage, as alleged in the complaint, but averred that the property encumbered by the mortgage did not include the tile and brick mill which he sold to Caldwell and Thomas; that no part of the property sold by him to these parties was included in or encumbered by the mortgage to Freeze, except a certain boiler and engine, each of which was old and much worn, and, at the time of the foreclosure of the chattel mortgage in question, were in the aggregate only of the value of \$25 and no more. As to this amount the answer alleged that the defendant was, at the time of the foreclosure of the said chattel mortgage and ever since has been, ready and willing to give plaintiff, Thomas, a credit upon the \$400 note, to the amount of the

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value of said engine and boiler. The answer concludes, that, by reason of these facts, the plaintiff was not entitled to have said note canceled, and judgment is demanded in favor of the defendant. It is contended by appellant that the court erred in sustaining a demurrer to this second paragraph of the answer. The main purpose or object of this action is to secure the application of the amount of money evidenced by the \$400 note, held by appellant, as a credit upon the mortgage indebtedness upon which a judgment in the foreclosure proceedings had been rendered. The cancelation of such note would follow as a matter of course as the effect of such application and credit. If appellant was entitled to avail himself of the facts alleged in the second paragraph of his answer as a defense in whole or in part to the application of the amount of the note in controversy in discharge of the mortgage indebtedness, such facts as therein averred, so far as they were pertinent, would have been admissible in evidence under the general denial pleaded in the first paragraph of the answer, hence, the error of the court, if any, in sustaining the demurrer to the second paragraph of the answer was harmless. *Jeffersonville, etc., Co. v. Riter*, 146 Ind. 521.

The record discloses that appellant filed what is denominated an amended cross-complaint whereby he demanded affirmative relief against appellees James W. Thomas, Oscar Miller, William C. Caldwell, and Levi Thomas, all of whom were made defendants to the cross-complaint. Each appeared and demurred separately to the cross-complaint. After the filing of these several demurrers, the following entry appears in the record: "Come now the parties by their attorneys, and the court being advised in the premises sustains the demurrer to the amended cross-complaint, to which the defendant, Daniel J. Troxel, excepts." Appellant in some four separate assignments predicates error upon the ruling of the court on the separate demurrer of each of the defendants to the cross-complaint. It is evi-

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dent that the record as embraced in the entry above set out, can not be accepted as supporting these assignments of error. An examination of the amended cross-complaint reveals the fact that it is at least insufficient as to some of the demurrants, if not as to all. The record, however, only discloses that "*the demurrer*" was sustained to the amended cross-complaint. (Our italics.) In this condition of the record it is clear that there is an entire absence of anything to show which one of the four separate demurrers to the amended cross-complaint was sustained. The solution of this question is left wholly to surmise. As we heretofore said, the cross-complaint is not sufficient as to all, hence we must, under the circumstances, presume that the particular demurrer sustained was that of one of the demurrants against whom the cross-complaint did not state facts sufficient to constitute a cause of action. Therefore no question is presented for our consideration under the assignment of error in respect to the rulings of the court upon the demurrers to the cross-complaint.

It is next and lastly insisted that the court erred in denying appellant's motion to set aside the judgment of the lower court upon the ground that the record does not show that there was a submission and trial of the cause. The following entry, however, appears in the record: "Come the parties by their attorneys, and, on plaintiff's motion, the court heard further testimony in this cause, to which the defendant excepts. The court having heard the further testimony and being advised in the premises finds for the plaintiffs." This we think is sufficient to disclose that there was a submission of the cause and a trial and finding by the court.

There is no available error, and the judgment is therefore affirmed.

State v. O'Leary.

THE STATE v. O'LEARY ET AL.

[No. 19,005. Filed November 27, 1900.]

INJUNCTION.—*Gaming.—Criminal Law.*—An injunction will not be granted at the instance of the State to suppress a gambling house, where the gambling house was located out upon a prairie almost a quarter of a mile distant from any house, and it was not shown that any person had been annoyed or disturbed, or any property injured.

From the Porter Circuit Court. *Affirmed.*

W. L. Taylor, Attorney-General, *Merrill Moores*, *S. T. Sutton*, *J. W. Youche* and *O. J. Bruce*, for State.

J. B. Peterson, *S. N. Chambers*, *S. O. Pickens* and *C. W. Moores*, for appellees.

DOWLING, C. J.—This was an application on behalf of the State for a restraining order forbidding the defendants from keeping and maintaining a gambling house in the town of Roby, in Lake county, Indiana. To render the injunction effectual, the appointment of a receiver, to take possession of the room and building where the gambling was alleged to be carried on, was asked for. Prayer for a permanent injunction on the final hearing of the cause.

The proceeding was by information filed in the Lake Circuit Court, by the Attorney-General and the prosecuting attorney of that county, which was duly verified.

The information charges, in substance, that all of the defendants, except Annie O'Leary, are, and since September 1, 1898, have been, unlawfully engaged in the business of selling pools, and keeping a room in which to sell pools, and in recording and registering bets and wagers upon the results of trials of skill, speed, and power of endurance of man and beasts in a certain room and building in Lake county, and State of Indiana, owned by the defendant, Annie O'Leary, but the real ownership of which is believed by plaintiff to be in James O'Leary; that the defendants on every day since September 1, 1898, up to and at the time of

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the filing of the information, unlawfully kept in said county and State a certain room and building, afterwards in said information particularly described, with apparatus, blackboards, blanks, papers, and other devices for the purpose of recording and registering bets and wagers upon the results of trials and contests of skill, speed, and power of endurance of man and beasts, and that unlawfully upon each of said days said defendants have recorded and registered bets and wagers, and sold pools upon the results of such trials and contests, said defendants upon each and all of said days being either the owners, lessees, or occupants of said room and building, and then and there unlawfully and knowingly permitted said room to be occupied, and did then and there unlawfully keep and exhibit apparatus, blackboard, blanks, papers, and divers other devices, for the purpose of recording and registering bets and wagers upon trials and contests of skill, etc.; all in violation of the criminal law of the State of Indiana. That said pool room and business was widely advertised by the defendants in papers having a large circulation among gamblers and sporting men throughout the State of Indiana, and other states; that the defendants, in order to bring a large number of gamblers from neighboring towns and cities to said pool room, ran, and did cause to be run, special trains from Chicago, and that they are now upon each and every day bringing together upon the premises aforesaid great crowds of persons ranging from 300 to 800, and will, unless enjoined and restrained from so doing, continue running said special trains and bringing together and causing to congregate in said room and said building said gamblers from said cities and towns; that on September 23, 1898, affidavits and informations were filed against said defendants charging them with the crime of pool selling, and that warrants were issued for the arrest of said defendants and were placed in the hands of the sheriff of Lake county to be served; that, notwithstanding the defendants were all in said room and building, the sheriff was

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unable to secure the arrest of more than three of them, for the reasons that the defendants at the time had assumed fictitious names, and denied that they were the persons named in the warrants; that the defendants are all residents of foreign states, but follow pool selling and gambling in various towns and cities, and, when driven from one place, always assume another and different name; that the gamblers who constitute the crowds which are brought together at Roby from this and other states are the friends of the defendants, and conspire and confederate with them in avoiding the process of the court and in avoiding arrests upon warrants in the hands of the sheriff, thereby rendering the arrest of the defendants by the sheriff and other peace officers impossible. -

That for the purpose of preventing prosecutions against them and deterring witnesses from giving evidence, whenever prosecutions are threatened or begun, the defendants circulate and publish reports that such proceedings are taken with a view of extorting blackmail from them; that the defendants claim to have organized a club, and are insisting upon the right to gather together gamblers and vicious persons, and to bring them in train loads to the said room and building to violate the criminal laws of Indiana, and to prevent persons coming into the room and building from furnishing testimony or identifying the persons for whom warrants are issued upon indictments and affidavits, and that the defendants have excluded, and claimed the right to exclude, from said room and building others than the sheriff and his deputies; that the defendants come on the same special trains with crowds of gamblers, criminals, and immoral persons to the said room and building, and leave on the same trains, so that the sheriff has no opportunity to make arrests except while the defendants are either in said room or with said crowds; that said room has never been used for any other purpose than for pool selling and other forms of gambling; that the room and building are provided

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with doors and other devices to prevent peace officers from entering, and that the defendants have placed at the doors men as guards to prevent any person from entering who might in any manner interfere with the violation of the criminal laws of the State, or who might truthfully testify against the violations of the laws; and that the room is so fortified that only the so-called members of the club, who are gamblers and criminals, are permitted to enter; that the room and building, and the real estate upon which the building is located, are in that part of the city of Hammond known as Roby, being the place indicated by the publications and score cards; that Hammond has a population of from 10,000 to 15,000 inhabitants, with a city government, mayor, and a large number of policemen, and that within a half mile of the room, and on the same public street, are two school buildings in which public school is being held; that within one-half mile of the room and building is located the town of Whiting, with a population of nearly 3,500 inhabitants, and near by is situated the city of East Chicago, with about the same population; that the defendants have continued daily to bring upon the said premises and into the said room, for the purposes aforesaid, large crowds of gamblers, and have each day continued in the same open and public manner, persistently, repeatedly, continuously, and intentionally to violate the laws of Indiana in defiance of the officers and inhabitants of the city of Hammond, the town of Whiting, the city of East Chicago, and the officers and citizens of Lake county, and are now asserting their intention so to continue such unlawful acts in defiance of such officers and inhabitants, and that they will do so unless enjoined; that because of such unlawful acts of the defendants, the citizens of the towns and cities, before named, in Lake county, have been essentially interfered with in the comfortable enjoyment of their lives and property, and that their general moral welfare is greatly injured, and the name

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and good repute of the citizens of Lake county is and will be greatly injured; that it is the purpose and design of the defendants permanently to establish gambling and pool selling in said building, and to continue to bring large crowds of gamblers, criminals, and immoral people into Lake county, in defiance of its citizens, officers, and the laws of Indiana, and that the defendants purpose to avoid arrests and prosecutions by the means aforesaid.

It is further charged that the room and building so used are entered from another building near by, so that it is necessary, in order effectually to enjoin and prohibit the doing of the things alleged in said room, and to prevent others from entering and using said building, to appoint a receiver with authority to take possession of the said room and building; that there is no adequate or effective remedy at law for the redress of the grievances set forth, and that said acts have become a public nuisance, and will continue to be and grow still more obnoxious unless the same be enjoined.

On the motion of the appellees, a change of venue was granted, the cause was sent to the Porter Circuit Court, and Hon. Robert Lowry was appointed a special judge to try it. All of the defendants appeared, and filed an answer in denial. The cause having been submitted for trial, and the evidence heard, a general finding was made for the defendants. The appellant filed motions, in various forms, for judgment in its favor, all of which were overruled, and there was judgment for the appellees on the finding. The appellant moved to modify the judgment, and also filed a motion for a new trial, both of which motions were overruled. The errors assigned and discussed embrace these rulings.

The sufficiency of the information is not challenged, and the question to be determined on this appeal arises upon the proof alone. The evidence fully sustained the charges of the information as to the nature of the resort, the unlawful

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practices carried on therein, the number and disreputable character of the patrons of the establishment, and the "open, repeated, persistent, and intentional violation of the statutes" against gambling by the appellees and others, at the place, and in the manner set forth in the information.

There was no proof that any person had been annoyed or disturbed by reason of the maintenance of the gambling house, or that any property rights of the State, were likely to be, in any manner, injuriously affected. The gambling house was remote from any other building, and was situated upon the open and uninhabited plain or prairie. The premises described were within the corporate limits of the town of Roby, and had been so located and operated for a considerable period of time. It was not shown that any of the inhabitants of Lake county, in any way, or under any circumstances, came in contact with the persons who frequented the gambling house. Nothing prevented the enforcement of the ordinances of the town, and the statutes of the State against gambling and the maintenance of gambling houses, excepting the indifference or sympathy of the community, or the indolence or faithlessness of the public officers of the town and county charged with that duty.

The question, therefore, for decision is whether an injunction may be had on the application of the State to suppress a gambling house, where no injury to property is shown; where no person has been annoyed or disturbed; where gambling in all of its forms is made a criminal offense by statute, and the ordinary criminal process for its punishment and suppression is in full force and available to the State.

While it is probably true that every indictable nuisance may, under particular circumstances, be enjoined, it cannot be said that a court of equity is bound, in every case, to award the extraordinary remedy of injunction upon the naked proof of the existence of such a nuisance. The circumstance that the acts constituting the nuisance are crimes

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or misdemeanors, and punishable as such, is not of itself a sufficient reason for refusing the writ. *Columbia Athletic Club v. State*, 143 Ind. 98, 28 L. R. A. 727; *State v. Crawford*, 28 Kan. 726; *State v. Saunders*, 66 N. H. 39, 25 Atl. 588, 18 L. R. A. 646; *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. ed. 1092; *Littleton v. Fritz*, 65 Iowa 488; *Port of Mobile v. Louisville R. Co.*, 84 Ala. 115, 4 South. 106.

Unless it appears, not only that a public nuisance exists, but that the public is subjected to actual annoyance or injury by it, the courts generally refuse to interfere by injunction, at least before indictment and a trial and conviction at law. Another element is usually found in the cases where an injunction has been granted to suppress an indictable nuisance, and that is the existence of some circumstances which seemed to render the immediate interference of the court necessary to prevent a real injury to the public,—proof of an exigency which the ordinary process of the court was not adequate to meet generally being required. In the present case, every unlawful act charged in the information as constituting the nuisance complained of is a crime or a misdemeanor, and is subject to indictment and punishment under the criminal code. The premises where the gambling is alleged to be carried on are not in a populous neighborhood, but out upon a prairie, the nearest house being nearly a quarter of a mile distant. The place has not been recently established, so that time was not afforded within which to present the offenders before the grand jury, but its existence has been of long standing and notorious. So far as the record discloses, no private person has made complaint of any injury sustained, or likely to be sustained, by himself or his property. Under these circumstances, we can see no legal reason why resort should not be had to criminal proceedings to punish and suppress acts, every one of which is expressly forbidden by the code as a crime or a misdemeanor, instead of casting the burden of

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the abatement of these unlawful practices upon the civil side of the court. A civil suit by information, in the name of the State, filed by the Attorney-General and the local prosecuting attorney, is but an indirect method of accomplishing an end which could more properly and more satisfactorily be attained by indictment. The apathy or sympathy of the local community and the negligence of the public officers, which prevent a criminal prosecution, or render its result doubtful, cannot be regarded as a reason why a civil action should be substituted for a criminal proceeding, and why the alleged violation of the criminal law should be tried and determined by a judge instead of a jury. *Maines v. State*, 42 Ind. 327; *State v. Houk*, 73 Ind. 37; 2 Bish. Crim. Proc., §813; *People v. Equity Gas Light Co.*, 141 N. Y. 232, 36 N. E. 194; *Attorney-General v. Tudor Ice Co.*, 104 Mass. 239; *State v. Patterson*, 14 Tex. Civ. App. 465, 37 S. W. 478.

Injunctions have been granted at the instance of the Attorney-General of the State to prevent the destruction of a bridge upon a public highway. *Attorney-General v. Forbes*, 2 Myl. & Cr. 123.

To prevent the deposit of filth and noxious refuse matter upon a private vacant lot in the city of London. *Attorney-General v. Heatley*, L. R. 1 Ch. Div. (1897) p. 560.

To prevent obstructions to the freedom of interstate commerce. *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. ed. 1092.

To prevent nuisances upon public highways. *Green v. Oakes*, 17 Ill. 249; *Craig v. People*, 47 Ill. 487.

To prevent the obstruction of rivers, harbors, or other navigable waters. *People v. Vanderbuilt*, 28 N. Y. 396; *Davis v. Mayor, etc.*, 4 Kern. 506, 526.

To prevent the pollution of streams. *Attorney-General v. Cockermouth Local Board*, L. R. 18 Eq. 172.

To restrain a corporation from exercising a franchise not granted to it by law. *People v. Third Ave. R. Co.*, 45 Barb. 63.

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On the other hand, there are many cases where a violation of law occurred with injury either to the public or to private individuals in which relief by injunction was denied.

It is said in High on Injunctions, §23: "The subject-matter of the jurisdiction of equity being the protection of private property and of civil rights, courts of equity will not interfere for the punishment or prevention of mere criminal or immoral acts, unconnected with violations of private rights. Equity has no jurisdiction to restrain the commission of crimes, or to enforce moral obligations, and the performance of moral duties, nor will it interfere for the prevention of an illegal act merely because it is illegal. And, in the absence of any injury to property rights, it will not lend its aid by injunction to restrain the violation of public or penal statutes, or the commission of immoral and illegal acts. Thus, the relief has been refused to prevent persons from carrying on the business of banking in violation of a statute restraining unincorporated banking associations. So, where it was sought to enjoin defendants from running their street cars on Sunday, in violation of a statute making it a penal offense, the relief was refused, although the action was brought by pewholders and property owners on the line of defendants' track. In all such cases, ample remedy may be had by proceedings at law, and the offense being *damnum absque injuria*, courts of equity will not interfere. And, in accordance with the well-settled doctrine that equity will not interfere with the administration of the criminal laws of the State, an injunction will not be granted against the enforcement of executions for costs issued against an unsuccessful party to a criminal prosecution. Nor will a court of equity enjoin a judgment imposed for violating a law of the State. Nor will it enjoin suits of a criminal nature." See, also, Wood on Nuisances (2nd ed.) §788; *Hamilton-Brown Shoe Co. v. Saxe*, 131 Mo. 212, 32 S. W. 1106; *State v. Patterson*, 14 Tex. Civ. App. 465, 37 S. W. 478; *Attorney-General v. Tudor Ice Co.*, 104 Mass. 239; *State, ex rel., v. Uhrig*, 14 Mo. App. 413.

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It may be stated that where the injury is *pressing* or *imminent*, so that the public safety is menaced, or public rights are obstructed or interfered with, and the special circumstances are such that the ordinary process of the courts is not sufficiently prompt or effective to prevent such injury or obstruction, the remedy by injunction may be applied, provided the right is clear and the wrong has not been acquiesced in by the plaintiff. The important inquiry in each case is whether, under the circumstances of the particular instance, there is a *necessity* for the exercise of that jurisdiction. The evidence in the case before us entirely fails to establish the existence of such a necessity at this time. We do not undertake to lay down any general rule, or to decide that a place where gambling is carried on, and where lawless and disreputable persons congregate for the purpose of gaming, may not, under special circumstances, constitute a public nuisance, and be a proper subject for the exercise of the powers of a court of equity. But, owing to the total failure of proof in the important particulars pointed out in this opinion, we are constrained to hold that the appellant failed to make such a case as warranted the interposition of the court by its extraordinary writ of injunction. *Crigho v. Dahmer*, 70 Miss. 602, 13 South. 237, 21 L. R. A. 84, 35 Am. St. 666, and notes; *Goodrich v. Moore*, 2 Minn. 61, 72 Am. Dec. 74, 16 Am. & Eng. Ency. of Law (1st ed.), 927.

Judgment affirmed.

REEVES AND COMPANY v. BYERS.

[No. 19,184. Filed November 27, 1900.]

SALES.—Warranties.—Where an engine was sold under a written warranty to do as good work as any other machinery of the same size, manufactured for a like purpose, there can be no implied warranty that the engine will do the work for which it was sold and purchased. pp. 536-538.

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SALES.—Warranties.—Breach.—Pleading.—In an action on a promissory note given for the purchase price of an engine, sold under a written warranty that it would do “as good or better, and as fast or faster, work as other machinery of the same size, and manufactured for a like purpose,” an answer alleging that the engine did not do “as good or better, and as fast or faster, work as any other machinery of the same size, manufactured for a like purpose, and that it did not do satisfactorily the work for which it was intended,” was insufficient, where it was not alleged that the engine was manufactured for the purpose of doing any of the kind of work for which it was alleged that defendant used same, and the size of the engine and the purpose for which it was manufactured were not shown. *pp. 538, 539.*

From the Parke Circuit Court. *Reversed.*

Marshall Hacker, S. D. Puett and J. S. McFaddin, for appellant.

Howard Maxwell, for appellee.

MONKS, J.—Appellant sued appellee upon certain promissory notes and a certain chattel mortgage executed by appellee to secure said notes, the consideration for the same being a traction engine sold by appellant to appellee. Judgment was rendered in favor of appellee. The errors assigned call in question the action of the court in overruling the demurrer to the third paragraph of answer, the demurrer to appellee’s counter-claim, and in overruling the motion for a new trial.

The third paragraph of answer and the counter-claim are founded upon appellant’s written warranty of the traction engine sold to appellee which is as follows: Warranty. “Caution. No person has any authority to add to or abridge or change this warranty in any manner, and to do so will render it void and of non-effect. The above ordered machinery is warranted to be well made, of good material, and with proper use and management to do as good or better, and as fast or faster, work as any other machinery of the same size, and manufactured for a like purpose. If within five days from the date of its first use the said machinery, except belting or hose, shall fail in any respect to fill said

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warranty, written notice, stating wherein it fails, is to be given Reeves & Co., at Columbus, Ind., by registered letter; also written notice must be given to the agent from whom received, and a reasonable time allowed to get to it and remedy defects, if any there be (if it be of such nature that the remedy cannot be suggested by letter), the purchaser giving the necessary friendly assistance. If the said machinery cannot be made to fill the warranty, a reasonable time shall be allowed to get a man from the factory, and if then the machinery cannot be made to do good work the undersigned agrees to return it to the place whence it was received, where another may, at the option of Reeves & Co., be furnished, which shall perform the work, or the money and notes which have been given for the same shall be returned and no further claim made on Reeves & Co. Defects in material or construction found in any one part of the machinery shall not condemn, or be grounds for returning, any of the above named machinery, but Reeves & Co. agree to furnish all necessary parts or replace defects in material or workmanship for a period of one year without cost to purchaser, except expressage, freight, or other expenses. The purchaser, in making claim for defects, will be required to present the broken or defective parts to the agent of whom the machinery was purchased, showing conclusively that they were defective. It is further mutually understood and agreed that the use of said machinery after the expiration of the time named in the warranty shall be conclusive as to the fulfilment of the warranty, and full satisfaction to the undersigned, who agrees thereafter to make no other claim on Reeves & Co., except for defective parts as mentioned above. And further, that if the above machine is delivered to the undersigned before settlement is made for same, as herein agreed, the undersigned, by taking possession of said machine without settlement, acknowledges full satisfaction and release of this warranty, and of any and all warranty express or implied." (Signed) Reeves & Co., (Incorporated). Franz S. Byers.

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It is alleged in the counter-claim, among other things, "that said engine was sold by appellant and purchased by appellee for the purpose of doing all kinds of work connected with the farm, but especially for the purpose of furnishing power to a separator in threshing grain".

The counter-claim proceeds upon the theory that said writing, when considered in connection with said allegations concerning the purpose for which said engine was sold and purchased, warranted the same to do the work for which it was sold and purchased; that is, it would furnish sufficient power to do all kinds of work connected with the farm, and to operate a separator in threshing grain. Such interpretation of the written warranty declared upon in the counter-claim is erroneous. The warranty contained in said writing is not that said engine will do the work for which it was sold and purchased, or that it will do good or satisfactory work, but that with proper use and management it will do "as good or better, and as fast or faster work, as any other machinery of the same size, and manufactured for a like purpose". It is the purpose for which it was manufactured and its size that is material, and not the purpose for which it was sold and purchased. It is true that when a machine or other article is sold for a particular purpose there is an implied warranty that the same is reasonably fit for the purpose for which it was made and sold. *Conant v. National State Bank*, 121 Ind. 323, 327, and cases cited. But in this case there was an express warranty in writing, and it has been held by this court that in such case implied warranties are excluded. *Conant v. National State Bank, supra*, p. 326, and cases cited. Unless the size and purpose for which said engine was manufactured are alleged, and facts are averred which show that with proper use and management it failed to do the work which it was manufactured to perform as good and as fast as other machinery of the same size, manufactured for a like purpose, no breach of the warranty that it will do as good or better, and as fast or

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faster, work as other machinery of the same size manufactured for a like purpose, is disclosed. The general allegation that "the engine did not do as good or better, and as fast or faster, work as any other machinery of the same size, manufactured for a like purpose, and that it did not do satisfactorily the work for which it was built or intended," is not sufficient, because the purpose for which said engine was manufactured is not alleged in said counter-claim, nor is it alleged that said engine was manufactured for the purpose of doing any of the kind of work for which it is alleged appellee used the same.

Other objections are urged against the sufficiency of said counter-claim, but it is not necessary to consider them as the counter-claim is clearly insufficient for the reasons given.

The third paragraph of answer is insufficient for the same reason. It follows that the court erred in overruling the demurrer to the counter-claim and in overruling the demurrer to the third paragraph of answer. Judgment reversed, with instructions to sustain said demurrers, and for further proceedings not inconsistent with this opinion.

FERRIS v. THE AMERICAN BREWING COMPANY.

[No. 19,245. Filed November 27, 1900.]

LANDLORD AND TENANT.—Covenant as to Use of Leased Premises.—Public Policy.—A covenant in a lease that the lessee should sell no beer upon the leased premises except that manufactured by a certain brewing company is not invalid as being against public policy. pp. 540-543.

SAME.—Covenant as to Use of Leased Premises.—Enforcement.—Parties.—A covenant in a lease that lessee should sell no beer upon the leased premises except that manufactured by a certain brewing company may be enforced by the company for whose benefit the contract was made, although the company was not a party thereto. pp. 543, 544.

INJUNCTION.—Landlord and Tenant.—Enforcement of Covenants in Lease.—Where a covenant was inserted in a lease prohibiting the lessee from selling beer upon the leased premises other than that manufactured by a certain brewing company, the company for whose benefit the contract was made may enforce such provision by injunction, the remedy at law being inadequate. p. 544.

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From the Marion Superior Court. *Affirmed.*

H. N. Spaan, for appellant.

C. W. Smith, J. S. Duncan, H. H. Hornbrook and *A. P. Smith*, for appellee.

MONKS, J.—This action was brought by appellee against appellant for an accounting, and to enjoin the violation of certain terms of a lease executed by Magdalena Maus to appellant. The errors assigned call in question the sufficiency of the complaint, and the correctness of the conclusions of law.

It appears from the special finding that appellee was engaged in the manufacture of beer and the sale thereof to dealers, and that it procured Magdalena Maus, who was related by blood or marriage to the stockholders in said company, to lease certain real estate on Washington street, in the city of Indianapolis, to appellant for the term of five years commencing on July 1, 1897. In consideration of appellee procuring said lease for appellant, he agreed with appellee that he would sell no beer upon said leased premises during the term of said lease, except that manufactured by appellee, and this stipulation was contained in the written lease executed by said Maus, and was as follows: "That the lessee further agrees, as a part of the consideration of the lease, to sell no other beer on said premises, except that manufactured by the American Brewing Company of Indianapolis, Indiana." Appellant entered into possession of said leased premises under said lease, which possession has continued until the present time. That, almost from the beginning, appellant violated said provision in said lease by purchasing and selling on said premises, without the knowledge or consent of appellee, beer manufactured at other breweries, and just prior to the commencement of this action practically ceased to purchase from appellee. That at the time of the negotiation of said lease, and at the time of the execution of the same, it was well understood by the parties

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to this action that said agreement, that no beer should be sold on said premises except that manufactured by appellee, was made for the benefit and advantage of appellee. That at all times since the execution of said lease, appellee has been ready to furnish appellant the beer manufactured by it, sufficient to supply his trade. That the beer so manufactured by it, and which it was at all times ready to furnish, was made out of the best material, and in a clean and well appointed brewery, where every care was taken to prevent foreign and deleterious substances from coming in contact therewith, and as well suited to the market in Indianapolis as any other beer manufactured and sold in said market. That appellee has not charged appellant at any time more than the fair market price of said beer, as it was generally sold upon the market to other saloon-keepers, and has sold the same to appellant at such prices as enabled him fairly to compete with other saloon-keepers similarly situated. Other facts appear in said finding, but they are not necessary to the determination of the questions presented.

The conclusions of law assailed by appellant are, in substance, that the provision in said lease for the benefit of appellee was valid, and appellee is entitled to enforce the same in this action, and is entitled to an injunction restraining and enjoining appellant from, at any time hereafter, during the continuance of said lease, selling upon said premises any beer other than that manufactured by appellee.

It is insisted by appellant that the conclusions of law are erroneous, for the reason that the agreement in the lease that appellant would "sell no other beer on said premises except that manufactured by the American Brewing Company of Indianapolis, Indiana" is invalid, because against public policy. Counsel for appellant has cited no authority to sustain this contention, and we know of none.

A contract that a person will not engage in a particular business at a special place, or within reasonable limits, is not illegal as being against public policy. *O'Neal v. Hines*,

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145 Ind. 32, and cases cited; *Beatty v. Coble*, 142 Ind. 329; *Eisel v. Hayes*, 141 Ind. 41.

A covenant by a lessee not to carry on a particular business, or not to carry on any business except a business named, on the leased premises, is binding, and may be enforced. 12 Am. & Eng. Ency. of Law, (1st ed.) 1025, 1026; 1 Beach on Injunctions, §§482-486; 1 High on Injunctions, §436; 2 High on Injunctions, §§1142-1149.

It has been uniformly held that a provision in a deed that no intoxicating liquors shall be manufactured or sold on the premises conveyed is valid, however much the same may affect the value of the property conveyed. *Cowell v. Springs Co.*, 100 U. S. 52, 57, 25 L. ed. 547; *Collins Mfg. Co. v. Marcy*, 25 Conn. 242; *O'Brien v. Wetherell*, 14 Kan. 616; *Orchard Canal Co. v. Sikes*, 8 Gray 562; *Watrous v. Allen*, 57 Mich. 362, 24 N. W. 104, 58 Am. Rep. 363; *Smith v. Barrie*, 56 Mich. 314, 22 N. W. 816, 56 Am. Rep. 39; 1 Beach on Injunctions, §482; 1 High on Injunctions, §1144.

It was held in *Sutton v. Head*, 86 Ky. 156, 5 S. W. 410, 9 Am. St. 274, that a provision in a deed that "no intoxicating liquors are to be sold on said premises in less quantities than five gallons" is not void as being in restraint of trade.

It is said in Greenhood on Pub. Pol. p. 677: "Rule DLX. A contract which secures to the obligee the exclusive custom of the party contracting, especially when by such contract the party making it procures an advantage not otherwise obtainable, is valid although the covenantor be engaged in public business, unless its enforcement would be prejudicial to the public."

Among the illustrations given by the author are the following: "A publican, in making a settlement with his creditors, agrees to buy all his beer of them. The agreement is valid."

"A contracts to furnish B with sewing machines, at a discount, and upon credit, provided B will deal exclusively with him. The contract of B is valid."

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"A agrees to buy of B all the groceries he may need, provided he will furnish them at as low a price as others. The agreement is valid."

"A covenants not to buy any meat for his trade, for six months, of any one but the covenantee. The agreement is valid."

"These contracts are upheld because they in no wise tend to diminish trade. A man is at liberty to buy of one entirely, if he chooses, and if he concludes to purchase entirely of him, he alone, and not the public, is injured."

It was held in *Chicago, etc., R. Co. v. Pullman, etc., Co.*, 139 U. S. 79, 11 Sup. Ct. 490, 35 L. ed. 97, that a railroad company may grant to a sleeping car company the exclusive right for a number of years to furnish drawing room and sleeping cars for the use of the railroad company, and bind itself not to contract during that period for the same kind of cars with any other party, and that such contract is not void as against public policy, nor is it restraint of trade.

We know of no rule of law which renders invalid the contract in said lease made by appellant for the benefit of appellee, and our attention has not been called to any case holding such a contract invalid. It is evident from the authorities cited that the provision of said lease, that appellant is to sell no beer on the leased premises except that manufactured by appellee, is not void.

Counsel for appellant next insist that, if said provision in the lease is valid, appellee, not being a party thereto, is not entitled to enforce the same, by injunction or otherwise.

The rule in this State is that a person not a party to a contract, but for whose benefit it was executed, may enforce his rights under the same. *Ransdel v. Moore*, 153 Ind. 393, 405, and cases cited; *Warren v. Farmer*, 100 Ind. 593; *Rodenbarger v. Bramblett*, 78 Ind. 213; *Tinkler v. Swaynie*, 71 Ind. 562; *Devol v. McIntosh*, 23 Ind. 529.

It is expressly stated by the court in the special finding, and clearly appears from the lease itself, that said provision

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was inserted in said lease for the benefit of appellee, and that it was so understood by the parties to the action. Appellee was therefore entitled to enforce said agreement, although not a party to the same.

It is a settled rule that provisions in a lease, by which the lessee agrees that he will not use the leased premises for certain purposes, or carry on any kind of business thereon, except the kind named, may be enforced by injunction. Beach on Injunction, §§482-486; 1 High on Injunctions, §436; 2 High on Injunctions, §§1142-1149; 2 Beach on Modern Eq. Jur. §§712, 603, p. 673, and notes; Watson's Comp. of Eq. (2nd ed.) 102; McAdam on Landlord and Tenant, (3rd ed.) 496, 1226, 1432, 1433; Wood's Landlord and Tenant, §§85, 434; 12 Am. & Eng. Ency. of Law, (1st ed.) 1025.

Moreover, it is a general rule that where one has made a valid contract that he will not engage in a certain business or occupation, and it is shown that the said contract is being violated, to the injury of one entitled to enforce the same, he is entitled to an injunction against the offending party. This is upon the ground that, from the nature of the case, just and adequate damages cannot be estimated for a breach of the contract. In other words, the remedy at law is inadequate. *O'Neal v. Hines*, 145 Ind. 32, 35, and cases cited; 1 High on Injunctions, §1142. The rule stated clearly applies to this case.

It follows that the conclusions of law were not erroneous. The rules which establish the correctness of the conclusions of law also sustain the sufficiency of the complaint. Judgment affirmed.

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**MANUFACTURERS GAS AND OIL COMPANY ET AL. v. THE
INDIANA NATURAL GAS AND OIL COMPANY.**

[No. 10,269. Filed November 27, 1900.]

NATURAL GAS.—Transportation from State.—Interstate Commerce.—
Constitutional Law.—The act of 1889 (Acts 1889, p. 369), in so far as it attempts to prohibit the owner of natural gas from transporting the same by safe methods out of the State, contravenes the federal Constitution relating to interstate commerce, and is void, since natural gas, when reduced to possession, is an article of commerce.

From the Grant Circuit Court. *Affirmed.*

Rollin Warner, A. W. Brady and W. A. Ketcham, for appellants.

W. O. Johnson, Foster Davis, J. C. Blacklidge, C. C. Shirley, Conrad Wolf and M. Winfield, for appellee.

DOWLING, C. J.—This action was brought to enjoin the appellee from transporting through pipes natural gas from the gas fields described in the complaint, within the State of Indiana, to any point without the State. The complaint is substantially the same as that in *Manufacturers Gas, etc., Co. v. Indiana Natural Gas, etc., Co.*, ante, 461, at the May term, excepting that it omits the allegation as to the use of artificial processes for the purpose of increasing the natural flow of the gas from the wells, and in that it charges that the appellee is engaged in transporting natural gas by means of pipe lines from the State of Indiana, to the city of Chicago, in the state of Illinois.

The suit is founded upon the act of March 9, 1889, which contains this provision:

“Sec. 1. Be it enacted, * * * that it shall be unlawful for any person or persons, company, corporation or voluntary association to pipe or conduct natural gas from any point within this State to any point or place without this State; * * *.”

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“Sec. 3. That any person, or persons, company, corporation, or voluntary association, or any officer, director, or agent of such corporation, that shall violate any of the provisions of this act, upon conviction thereof, shall be deemed guilty of a misdemeanor and shall be fined in any sum not less than one hundred dollars or more than one thousand dollars.”

In the absence of legislative restriction, the transportation of natural gas to points without the State would, undoubtedly, be legal, and such use and disposition of the article, probably, could not be interfered with or prevented. The right of the appellant to relief by way of injunction, if it exists at all, must be derived from the statute. But in *State v. Indiana and Ohio, etc., Co.*, 120 Ind. 575, 6 L. R. A. 579, this court held the act of March 9, 1889, invalid, for the reason that it affected interstate commerce, natural gas, when reduced to possession, in reservoirs or pipes, being recognized as an article of commerce. The doctrine stated in that case was reasserted in *Jamieson v. Indiana Natural Gas and Oil Co.*, 128 Ind. 555, 12 L. R. A. 652, and it has not since been questioned in any other decision of this court. It is not alleged in the complaint before us that the appellee is appropriating an undue proportion of the common fund, or supply of gas, or that it is using any device or artificial means to produce an unnatural flow of gas from its wells, to the injury of the appellants. Neither is it charged that the means adopted by the appellee for transporting the gas are in any respect improper, dangerous to life or property, destructive of the common supply, or likely to inflict injury of any kind upon the appellants. The right of the appellee to take gas from its own wells in the manner adopted by it is not denied. Nothing done by the appellee is complained of, excepting only that it removes natural gas out of the State of Indiana. No ground for the exercise of the police power of the State to prevent such removal is shown. Nothing, save the naked right to transport the gas beyond the limits

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of this State, is contested in this action. The only reason which can be urged in support of the restraint sought to be imposed upon the appellee is that the supply of natural gas being limited, and the article being one of great value and convenience, its use ought to be reserved for and enjoyed by the people of this State, to the exclusion of the inhabitants of any other State. But as natural gas when reduced to possession is held to be a commercial commodity, its owner cannot lawfully be prevented from carrying it to, and selling it in whatever market he may consider most advantageous. It is true that the Supreme Court of the United States has recently held in *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. ed. 793, that a statute, prohibiting the transportation of wild game beyond the limits of the state in which it is taken or killed, is not in conflict with the Constitution of the United States. But, the distinction between animals *ferae naturae* and natural gas, in respect of their ownership, before reduction to possession, is a very plain one, and has been clearly pointed out in numerous decisions. *Manufacturers Gas, etc., Co. v. Indiana, etc., Co., ante*, 461.

In the case of wild animals, before they are reduced to possession, the ownership is in the public, and not in any private person, and they are, therefore, held to be subject to the protection of the sovereign. The privilege of taking, killing, and transporting them may, on this ground, be regulated by the legislature. As to natural gas, however, the public has no title to, or control over, the gas in the ground. On the contrary, so far as it is susceptible of ownership, it belongs to the owners of the superincumbent lands in common, or, at least, such landowners have a limited and qualified ownership in it to the entire exclusion of the public.

To the extent that the act of March 9, 1889, attempts to prohibit the owner of natural gas, which has been reduced to possession by proper and lawful means, from transporting it by safe and reasonable vehicles, or conduits, out of the State of Indiana, it contravenes the provisions of the fed-

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eral Constitution relating to interstate commerce, and is therefore void. No other foundation for the claim of the appellants to relief by way of injunction being disclosed, the complaint must be held insufficient. The demurrer thereto was properly sustained. Judgment affirmed.

HAINES ET AL. v. WEIRICK.

[No. 19,289. Filed November 27, 1900.]

DEEDS.—*Life Estate.*—A condition in a deed of general warranty reserving to the grantors an estate for the life of each “with the absolute control of the said real estate, the same as if this conveyance had not been made, for and during the period of the natural life of the grantors,” is not inconsistent with the grant in fee contained in the deed. *pp. 549, 550.*

SAME.—*Consideration.—Death of Payee.*—Where by the terms of a deed the consideration was made payable to the grantor’s grandson when he should arrive at the age of twenty-one years, and the grandson died before he was twenty-one years of age, his heirs at law were entitled to recover the amount at the time the deceased payee would have become of age had he lived. *pp. 550-552.*

From the Kosciusko Circuit Court. *Reversed.*

Summy & Summy and *S. J. North*, for appellants.

L. W. Royse, Bertram Shane and *J. W. Cook*, for appellee.

DOWLING, C. J.—This case was transferred to this court by the order of the Appellate Court. The suit is for the recovery of a part of the consideration for the conveyance of a tract of land, and is prosecuted by the heirs at law of the deceased payee against the grantee named in the deed. A demurrer to the complaint was sustained, and judgment followed. The error assigned calls in question the ruling on the demurrer.

The facts stated in the complaint are these: December 2, 1885, Henry Weirick and his wife, Elizabeth, executed to the appellee, William H. Weirick, a deed of general warranty for eighty acres of land, situated in Kosciusko county,

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Indiana, reserving to the grantors an estate for the life of each, in said lands; the consideration expressed in the deed was \$1, and that the grantee should pay to Ora F. Haines, the grandson of the grantor, \$500, without interest until it should become due, when the said Ora F. should arrive at the age of twenty-one years; a lien to secure such payment being retained in the deed. The grantee accepted the deed, and caused it to be placed upon record. One of the grantors, Henry Weirick, died September 18, 1887, and the said Ora F. Haines died February 25, 1891, not having arrived at the age of twenty-one years. The latter left surviving him as his sole heirs at law his father, Robert Haines, and the other appellants herein, who were his half-brothers and sisters. It is averred that all the debts of the said Ora F. have been paid, and that no administration on his estate is necessary; that the said Ora F., had he lived, would have become twenty-one years old August 16, 1897; that said sum of \$500 is now due, and payable to the appellants, as the heirs of the said Ora F., and that the appellee, although requested, refuses to pay the same. Prayer for judgment for the \$500, with interest from August 16, 1897, and for the foreclosure of the lien reserved in the deed.

It is contended on behalf of the appellee that the reservation of the life estate "with the absolute control of the said real estate, the same as if this conveyance had not been made, for and during the period of the natural life of the grantors, and of each of them," is inconsistent with the grant contained in the instrument, and operates to defeat it. We think otherwise. The deed conveys a fee to the grantee, subject to a life estate in the grantors. During the existence of the life estate, the grantors could consistently, with the grant of a remainder in fee, continue to exercise absolute control over the land to the same extent as if the deed had not been made. Such control, so reserved in the deed, related to the use, enjoyment, and management of the

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land, and cannot be understood to authorize the life tenants to impair or destroy the title of the grantee and remainderman by another conveyance. Besides, if it were true that the reservation contained in the deed was inconsistent with the estate thereby granted, such reservation would probably be void. 5 Am. & Eng. Ency. of Law (1st ed.) 456; 1 Shep. Touch. 79.

It is next argued that the \$500 was payable to Ora F. on the condition that he should live until he became twenty-one years old, and that the contingency on which it was to become due and payable having failed by his death, the grantee is not liable to pay it at all. *Cravens v. Eagle Cotton Mills*, 120 Ind. 6, 16 Am. St. 298; *Olds Wagon Works v. Coombs*, 124 Ind. 62; *Henry v. Thomas, Ex.*, 118 Ind. 23; 2 Rand. on Com. Paper, §113, p. 153; *Marsh v. Wheeler*, 2 Edwards 155; *Harris v. Fly*, 7 Paige, 421; *Delavergne v. Dean*, 45 How. 206; *Knight v. Pottgeiser*, 176 Ill. 368, 52 N. E. 934; *Scofield v. Olcott*, 120 Ill. 362, 11 N. E. 351; *Carper v. Crawl*, 149 Ill. 465, 36 N. E. 1040; and *Heilman v. Heilman*, 129 Ind. 59, are cited in support of this view.

The case is governed by the rules stated in *Goss v. Nelson*, 1 Burr. 226. In that case, the question depended entirely upon the validity of a promissory note given to an infant payable "when he (the infant) shall come of age", and specifying the time when that was to be, viz., 12th of June, 1750. It was insisted, on behalf of the defendant, that the notes set forth in the declaration were not notes for the benefit of trade; nor was the money made certainly payable. The note was given to the plaintiff thirteen years before the time when he was to come of age; and it was not at all certain that he would live to attain that age. In order to have the effect of a promissory note within the statute, it ought to be a cash note and payable at all events. In deciding the case, Lord Mansfield said: "It would have been clearly good, if it had been made payable on the 12th of

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June, 1750; (that is to say, on a day certain;) without mentioning the plaintiff's being then to come of age; and surely it is not the less certain, for adding that circumstance. Legacies are of a different nature; and they are determined by different rules. They are directions to the executor to pay; and in legacies there is a known distinction between the time being annexed to the substance of the gift, or to the payment. If complete words of gift direct the executor to pay, the other words only fix the time of such payment; and then the legacy vests, and is transmissible, though the legatee should die before the day of payment; as a legacy given, 'to be paid at twenty-one.' But if the time is annexed to the substance of the gift, as a legacy 'if,' or, 'when' he shall attain twenty-one, it will not vest before that contingency happens. But here, the words of engagement make the debt; and 'tis no direction to another person. The former part of the note is a promise to pay the money; and the rest is only fixing the particular time when it is to be paid. It is enough if it be certainly and at all events payable at that time, whether he lives till then, or dies in the interim. Therefore, it is a good note, within this remedial statute."

Denison J., concurring said: "Here is no condition or uncertainty; but it is to be paid certainly, and at all events; only the time of payment is postponed."

Foster, J., concurring said: "A legacy may be given upon any terms. But upon a promissory note, the time of payment is only for the benefit of the debtor. Here, the time of payment is certainly fixed; and the particular day specified for payment of the money, being mentioned to be the day on which the infant is to come of age, makes no difference from what it would have been, if that circumstance had been omitted."

"And they all agreed that that this was *debitum in praesenti*, though *solvendum in futuro*."

The consideration for the conveyance of the land was the

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payment of the \$500 by appellee. The grantor had the right to say to whom that consideration should be paid. Acceptance of the deed by the grantee created a debt *in praesenti*, and rendered him liable to pay the \$500 agreeably to the terms of the instrument. *Leach v. Rains*, 149 Ind. 152.

The postponement of the time of payment was not conditional on Ora F. attaining the age of twenty-one years, but was to be made whether Ora F. lived or died. The date at which Ora F. would become of age simply fixed the limit of the credit. The time when the \$500 would become due was as certainly stated and as definitely ascertained as if August 16, 1897, had been inserted. Unless the appellee is liable to pay that sum to the heirs of Ora F., he will get the land for nothing. It cannot be said that the grantor contemplated such a result.

Judgment reversed, with instructions to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

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[No. 19,898. Filed November 27, 1900.]

155	552
167	119

CRIMINAL LAW.—Instructions.—Record.—Instructions in a criminal case can only be made a part of the record by a bill of exceptions. *p. 553.*

155	552
d165	401
165	568

SAME.—Larceny.—Evidence.—Defendant engaged a horse and buggy at a livery stable to drive to the country to solicit insurance, saying he would return in the evening of that day. He met one of the men he was going to see, and, being informed that the other persons he desired to see were not at home, he drove to a town about forty miles distant, and wrote and mailed the owner of the horse a letter that he would be compelled to remain three or four days. He remained at the town soliciting insurance, put the horse in a livery stable, registered at a hotel, and made no effort to conceal his identity, nor to sell the horse, and again wrote the owner of the horse, and fearing he would not receive it as soon as he should, telegraphed, informing him of his whereabouts, and of his being detained, and was arrested on that evening. *Held*, that the evidence was insufficient to support a conviction of defendant of the larceny of the horse and buggy. *pp. 554-559.*

155	552
f167	318

155	552
f170	131

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CRIMINAL LAW.—Larceny.—Felonious Intent.—Where possession of property is obtained by a bailee for hire, a subsequent appropriation of the property by the bailee is not larceny, unless the felonious intent to appropriate it existed in his mind at the time he obtained the possession. *p. 559.*

From the Jackson Circuit Court. *Reversed.*

John L. Shrum, for appellant.

W. L. Taylor, Attorney-General, *C. C. Hadley* and *Merrill Moores*, for State.

JORDAN, J.—Appellant was charged with having on August 5, 1899, at the county of Jackson, State of Indiana, feloniously taken and stolen a certain horse and buggy of the value of \$150, the same being the property of one Allen S. Crane. He was tried by a jury and convicted of the offense of grand larceny as charged, and over his motion for a new trial was sentenced by the court to be imprisoned in the Indiana State prison for the period of from one to fourteen years and to be fined in the sum of \$1 and disfranchised for the period of one year. From this judgment he appeals to this court and assigns as error the overruling of his motion for a new trial. Two questions are presented. (1) The alleged error of the trial court in giving certain instructions; (2) that the evidence is not sufficient to sustain the verdict of the jury. The Attorney-General as the representative of the State, in his brief filed in this appeal, raises the question that the instructions are not in the record for the reason that they have not been made a part thereof by a bill of exceptions. This the record discloses to be true and we therefore concur in this contention of counsel. That instructions in a criminal case can only be made a part of the record by means of a bill of exceptions, has been so frequently decided by this court, and the rule is so well recognized by the bar, that the citation of authorities in support thereof would be useless. At the very threshold, in the examination of the evidence, we are confronted with the concession of the learned Attorney-General to the effect that

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under the evidence the appellant ought not to have been convicted of the crime of larceny. In closing his brief he says "Believing as I do that the evidence is insufficient to sustain the verdict, I cannot conscientiously ask the court to affirm the judgment of the court below." This frank admission upon the part of the State's chief legal representative, is certainly to be commended, for it is not his duty in the appeal of a criminal cause to this court, to endeavor to uphold the judgment of the lower court when he is satisfied that such judgment is impressed with reversible error. We have fully examined and considered all of the evidence given in this prosecution on the trial in the lower court and the material part thereof is substantially as follows: Appellant is a man forty-nine years of age and prior to the time of his arrest on the charge in question he was engaged in life insurance business for the John Hancock Life Insurance Company. He would travel through the country and solicit life insurance from persons, and also endeavor to secure loans of money for persons from the company which he represented. About a year before the time he obtained the horse and buggy, alleged to have been stolen, he had been at Seymour, Jackson county, Indiana, and had made the acquaintance of one John Ridlin, who was an employe at that time in the livery stable of a Mr. Crane in that city. In the latter part of July, 1899, appellant returned to Seymour for the purpose of soliciting insurance through the country. He went to Crane's livery stable and there met Mr. Ridlin who was still in the employ of Crane at his stable. He gave Ridlin his business card and asked if he remembered him and Ridlin replied that he did. On that occasion appellant hired of Ridlin a horse and buggy belonging to Crane's stable and drove into the country. Prior to August 5, 1899, as the evidence shows, he hired a horse and buggy from the same stable some five or six different times and made trips in the buggy out into the country. On Thursday evening, August 3, 1899, he seems to have

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engaged a horse and buggy at this stable and directed that the conveyance be sent around on Saturday morning, August 5th, at 8 o'clock to the hotel in Seymour where he was stopping. Ridlin took the horse and buggy so engaged by appellant to the hotel upon the morning in question. Appellant told him at that time to have the bill made out for the amount which he owed for livery hire and when he returned in the evening of that day he would pay it. Ridlin turned the horse and buggy over to appellant and he started to drive to Cortland, a small town about five or six miles from Seymour, and was also intending to see some persons at Freetown and Surprise. On the road to Cortland he met Dr. Whitted, whom he was intending to see at Cortland. He and Whitted talked over the business of life insurance and he explained to the doctor the plans of his company for which he was soliciting insurance. In this conversation he inquired of Whitted as to the best road to Bloomington in Monroe county, a county which is adjacent to that of Jackson. In this conversation appellant incidentally told Whitted that the horse and buggy belonged to him. After leaving Dr. Whitted he drove on to Surprise, and at this latter town he received information that the persons he desired to see at Freetown were not at home. After leaving the town of Surprise, and when near Freetown, he wrote and mailed a letter to Mr. Crane, the owner of the horse and buggy, informing him that in order to complete his business he would be compelled to remain over Sunday, and would not return to Seymour until Monday evening. This letter was received by Crane in due course of the mail, and was introduced in evidence at the trial by the State. Appellant when near the town of Kurtz on the road leading to Bloomington met a man with whom he conversed in regard to life insurance, and inquired the road to Maumee, saying he wanted to see a Mr. Hoover who resided there. He stopped at this latter town and had a talk with Hoover in regard to his taking life insurance, and informed Hoover that he was

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going to Bloomington. After leaving Maumee he went on to Bloomington reaching there some time in the evening of August 5th. He stopped at the Gentry hotel, the leading hotel in that city, and registered his true name on the hotel register, and placed the horse in a livery stable. Appellant was acquainted at Ellettsville with a Mr. Fryhofer, a banker and the cashier of the Ellettsville bank. This latter town is situated on the Monon railroad and is about six or seven miles from Bloomington and about forty miles from Seymour. Appellant had previously sold to Fryhofer's bank some notes and had transacted other business with the same bank. After reaching Bloomington he telephoned to Fryhofer that he was at the latter place and he was requested by Fryhofer to come over to Ellettsville. It seems that appellant had previously negotiated some loans for the Central Union Life Insurance Company, and had made arrangements with Mr. Fryhofer's bank that in the event this company did not accept these loans that he would turn them over to the Ellettsville bank, which, it seems, had agreed to accept them. Upon Fryhofer's request appellant left Bloomington the next day, Sunday, and went to Ellettsville. On reaching this town he stopped at the hotel and placed the horse in a livery stable. He remained at Ellettsville from the time he arrived there on Sunday, August 6th, until the following Saturday, when he was arrested upon the charge of the larceny of the horse and buggy. While at Ellettsville he employed his time in driving out into the country soliciting applications for insurance and endeavoring to secure loans of money for persons from the company. He was frequently, during the time he was at Ellettsville, at Fryhofer's bank and prepared some of the applications for insurance which he had taken at that bank. He had previously sold, as we heretofore stated, to the Ellettsville bank some notes. The bank, it seems, had instituted suit upon one of the notes obtained from appellant and by him indorsed to the bank, the maker of which claimed that he

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had a defense thereto, and the trial had been set before a justice at Ellettsville for Friday, August 11th. After appellant had been at Ellettsville a few days Fryhofer requested him to remain over for this trial to be a witness for the bank and he consented to do so. On Friday morning, August 11th, appellant wrote a letter to Mr. Crane, the owner of the horse, which letter was received by Crane on Sunday, August 13th, and was introduced in evidence by the State. By this letter he informed Crane of his whereabouts and in regard to his detention and that he would return in a few days and would settle all bills due for the hire of the horse and buggy. This letter bears the date of August 11th and was mailed August 12th. According to appellant's statement he gave this letter the day it was written to a porter of the hotel at Ellettsville, where he was stopping, to mail, and the porter neglected to mail it until Saturday, August 12th. On the morning of that day appellant learned that the letter had not been mailed on Friday, and fearing that for this reason Mr. Crane would not receive it as soon as he should, he sent a telegram to Crane on Saturday the 12th about 2:30 o'clock p. m. informing him where he was and of his being detained. This telegram is as follows, and was introduced in evidence by the State: "Ellettsville, Ind., Aug. 12, 1899. Crane & Son, Seymour, Ind. Am detained here on business. Will return next week. Will send check on Monday to cover bill. All O. K. [Signed] H. M. Stillwell."

It is disclosed that this telegram was received at Seymour at 3:12 o'clock p. m. of the day it was sent. Mr. Crane, it appears, did not receive it that early. On Saturday, August 12th, Crane in his endeavor to locate appellant learned that he had been at Bloomington and had gone from there to Ellettsville, and thereupon he telephoned to the sheriff of Monroe county to go to Ellettsville, arrest appellant, and get the horse. Appellant testifies that he did not receive information that he was to be arrested until about 4 o'clock p. m.

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on Saturday, August 12th, and in this he is corroborated by Mr. Fryhofer. He was arrested by the officers about one hour after he received this information. They arrested him without a warrant and he made no effort to escape but went with the officers willingly, protesting that he was innocent of the crime alleged against him. There was no evidence to show that appellant made any attempt or offered to sell or in any manner dispose of the horse and buggy in question. There is an entire absence of evidence showing that he made any effort or endeavored to hide or conceal his whereabouts or his identity, but upon the contrary he seems, as the evidence shows, to have disclosed on all occasions his true name and the place or places where he was going. We certainly concur in the conclusion reached by counsel for the State in respect to the insufficiency of the evidence to support the conviction of the appellant of the larceny of the horse and buggy in controversy. It is not a case upon which there may be said to be some evidence to sustain all of the essential elements necessary to constitute the offense of which appellant was charged and convicted, but is one in which there is a manifest failure of the evidence to establish one of the material or cardinal ingredients in the crime of the larceny as charged, namely, that of the existence in the mind of appellant of the felonious intent at the time he obtained the horse and buggy in controversy. The crime of larceny in a legal sense is said to be committed when a person wrongfully takes and carries away the personal goods of another, without any color or pretense of right, with the felonious intent to deprive the owner, without his consent, of such property, or to appropriate it to the use of the taker. *Robinson v. State*, 113 Ind. 512. In the case last cited Mitchell, J., speaking for this court said: "The taking and carrying away are felonious or not, depending upon whether the taker intended at the time permanently to deprive the owner of his property without his consent, or whether he merely intended temporarily to use it wrong-

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fully, mischievously or wantonly, it may be, and then return or abandon it to the owner, without substantial injury. Taking, though wrongfully, for a mere temporary purpose, is not larceny. *Umphrey v. State*, 63 Ind. 223; *Starck v. State*, 63 Ind. 285; *State v. Wingo*, 89 Ind. 204; 1 Whart. Crim. Law §885." Of course the rule is well settled that the crime of larceny may be committed although the possession of the property alleged to have been stolen is obtained with the consent of the owner, if such consent is procured through deception and with the felonious intent not to return the property but to appropriate it to the taker's own use. *March v. State*, 117 Ind. 547; *Fleming v. State*, 136 Ind. 149. There can be no reason, however, for asserting that the case at bar, under the circumstances, falls within this rule of the criminal law. The evidence shows that appellant obtained possession of the property in controversy as a bailee for hire. The rule is elementary in such cases that a subsequent appropriation of the property by the bailee is not larceny, unless the felonious intent to appropriate it existed in his mind at the time he obtained the possession. The evidence in this case is utterly incompatible with such a theory. While it may be said that the act of the accused in detaining the horse longer than he ought to, without the consent of the owner, was reprehensible and a breach of good faith, still such wrong is not punishable by the law pertaining to larceny.

Without further comment we conclude under the circumstances that the court erred in denying appellant's motion for a new trial. The judgment is therefore reversed, and the cause remanded to the lower court, with instructions to sustain the motion for a new trial. The clerk of this court will issue the proper warrant for the return of the prisoner from the Indiana State prison to the custody of the sheriff of Jackson county. Monks, J., was absent.

155 560
168 118
168 119

MACMURRAY, RECEIVER, ET AL. v. SIDWELL.

[No. 19,487. Filed November 27, 1900.]

BUILDING AND LOAN ASSOCIATIONS.—Insolvency.—Foreign Associations.—Preference of Stockholders.—A foreign building and loan association entered the State of Indiana in 1890, complied with the laws in force relative to foreign corporations, issued stock and made loans from a common fund collected from the various states in which it did business until the passage of the act of 1898 requiring such associations to make a deposit, when the association ceased doing any new business. Thereafter the association became insolvent, a receiver of its assets in Indiana was appointed, and a general receiver for all of its assets save those of Indiana, and, it appearing that the assets in Indiana exceeded the claims, appellee on behalf of the Indiana stockholders, sought to have the Indiana stockholders paid in full from the assets in the State. *Held*, that the Indiana stockholders have no preferential claim upon the Indiana assets.

From the Delaware Circuit Court. *Reversed*.

James Bingham and Jesse Long, for appellants.

G. H. Koons, H. F. Wilkie and Henrietta Wilkie, for appellee.

BAKER, J.—On May 14, 1898, in a suit begun in the Delaware Circuit Court by Charles and Eudora Ticknor against the National Home, Building and Loan Association, organized and existing under the laws of Illinois and having its home office at Bloomington, Illinois, the association was found to be insolvent and appellant Francis James was appointed receiver of its assets in Indiana. On May 19, 1898, in a suit pending in the Circuit Court of the United States for the southern district of Illinois, the association was found to be insolvent and appellant James E. MacMurray was appointed receiver of all its assets save those in Indiana. Thereafter and during May, 1898, Mr. MacMurray was appointed ancillary receiver by the Circuit Courts of the United States for the various districts in which the association had done business. On October 16,

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1899, appellee, Andes M. Sidwell, a stockholder of the association who resides in this State, on behalf of himself and all other Indiana stockholders, filed a petition in the receivership case pending in the Delaware Circuit Court, asking the court to order Mr. James to pay the Indiana stockholders in full from the Indiana assets and pay the balance only to Mr. MacMurray. Thereupon Mr. MacMurray obtained an order from the Circuit Court of the United States for the southern district of Illinois, directing him to intervene in the cause in the Delaware Circuit Court. By leave of the Delaware Circuit Court Mr. MacMurray and Mr. James, as receivers, filed an intervening petition, asking among other things that the Indiana assets be added to the other assets and that the whole be distributed equally among all the stockholders in proportion to their payments on stock. Mr. Sidwell, on behalf of himself and all other Indiana stockholders, was permitted to file a demurrer to the receivers' petition for want of facts. The court sustained the demurrer, and, on the receivers' refusal to plead further, entered judgment that they take nothing by their petition. The court granted the receivers' prayer for an appeal to this court.

The material facts in the petition are these: The association was organized in February, 1890, under the statutes of Illinois. The statutes, the association's charter and its by-laws are set forth. The charter and by-laws are similar in scope to those of associations organized in this State. The statutes, in spirit, are the same as Indiana's. The association was formed to do a "building and loan" business, which, as Endlich says, "in its essential plan and nature is the same all over the world". It transacted business in various states until the appointment of the receivers. There are no general creditors. The claimants in all the states are stockholders. At the time of the appointment of the receivers the total claims amounted to \$579,388

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and the appraised value of all the assets to \$376,640. In some of the states the assets exceeded the claims. In the greater number of them the claims exceeded the assets. In Indiana the assets were \$79,625 and the claims \$54,329. The assets consisted of evidences of loans and of real estate obtained in collecting loans. The loans were all made at the home office in Bloomington, Illinois. The Indiana assets originated from loans from a common fund created by proportionate contributions of all stockholders regardless of state lines. On entering Indiana in 1890 the association complied with the foreign corporations act of 1852 by filing in each county the required certificates of agents' authority and of the association's consent to be sued by process served on Indiana agents. The association did not make the deposit required by the foreign building and loan associations act of 1893, which came into force on May 18, 1893. After April 1, 1893, the association made no new contracts, issued no new shares, executed no new loans, in Indiana; and did no business in the State other than to collect dues on stock, and interest and premium on loans, already in existence. Mr. James has over \$20,000 on hand in cash. Mr. MacMurray has in his hands all of the assets of the association except those in Indiana, and all the claims of stockholders except of Indiana stockholders. In directing Mr. MacMurray to intervene in the Delaware Circuit Court, the Circuit Court of the United States for the southern district of Illinois entered an order indicating the plan of distribution that would be carried out if possible, namely, that the two courts should coöperate to the end that there be one and a harmonious administration of the estate by distributing all the assets wherever collected among all the stockholders wherever resident, and that if Mr. James be ordered from time to time to turn over to Mr. MacMurray the net proceeds of Indiana assets Mr. MacMurray shall treat the claims of Indiana stockholders approved by the Delaware Circuit

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Court as adjudicated claims, and that Indiana stockholders shall receive the same distributions, according to the respective amounts paid in by them on stock, as are received by the stockholders of any other state.

This association was a coöperative enterprise. It dealt only with its own members. It was a corporate copartnership, so to say. Mutuality and equality were its essential working principles. Every stockholder, whether in Indiana or another state, contributed to a fund in which all had interests in common. If the enterprise had been successful, all would have received dividends proportionate to their investments as stockholders. On insolvency, the assets should be distributed according to the nature and source of the fund and of the claims upon it. The fund is the common property of all the stockholders and the claims upon it are the demands of all the stockholders for a distribution. The loss should be borne by those who would have shared the profits, and in the same proportions. *Marion Trust Co. v. Trustees Edwards Lodge*, 153 Ind. 96; *Huter v. Union Trust Co.*, 153 Ind. 204; *James v. Sidwell*, 153 Ind. 697.

The doing of a building and loan business in Indiana, whether by a domestic or a foreign association, contravenes neither the statutes nor the public policy of this State. *Security Savings Assn. v. Elbert*, 153 Ind. 198; *International Bldg. Assn. v. Wall*, 153 Ind. 554; *Equitable Loan Assn. v. Peed*, 153 Ind. 697; *National Loan Assn. v. Black*, 153 Ind. 701; *United States Loan Co. v. First Methodist Church*, 153 Ind. 702. This association, in entering the State in 1890 and in continuing to do business until April 1, 1893, complied with the statutes then in force. There is no merit in appellee's suggestion that it was against public policy to admit this association because the Illinois statutes authorized a larger capitalization than did the Indiana statutes. It is the nature and not the size of a business that determines its legality. The association did not make the deposit required by the act of 1893. Acts 1893, p. 274,

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§§4464-4483 Burns 1894, §§3420v-3420oo Horner 1897. Regarding this act it was said in *Security Savings Assn. v. Elbert, supra*: "The act of 1893, declaring that it shall be unlawful for a foreign corporation to do a building and loan business in this State, until it shall have deposited bonds, etc., must be read prospectively, if possible; must be read as not impairing the obligation of existing contracts, to be constitutional. To meet these requirements the act must be construed to mean that the business which may not lawfully be done, until the terms imposed are complied with, is the making of new contracts, the issuance of new shares, the execution of new loans. If a contract is valid when executed, which contemplates the lapse of several years before all of its terms are carried out, it must be held to remain valid and enforceable to the end, under the law in force at the time of its execution, no matter what changes the law has undergone in the lifetime of the contract." The petition shows that the association, under the foregoing interpretation of the act of 1893, did no business in Indiana after the act went into effect. On the taking effect of the act, the association was under no legal nor moral obligation either to the State or to its stockholders in Indiana to make the deposit. The association had the option either to quit business in the State or to make the deposit and continue. To hold that the association, by deciding to quit, forfeited its right to collect what was coming to it on business already done, would work or at least tend to work a confiscation of its property. The case of *Lewis v. American Savings Assn.*, 98 Wis. 203, 73 N. W. 793, 39 L. R. A. 559, wherein it was held that Wisconsin stockholders had a preferential claim upon the deposit made by a foreign building and loan association, is not in point, because here the association elected to quit and not to make the deposit. Neither is the question involved as to what would be the rights of Indiana stockholders (or those who might have become stockholders after the taking effect of the act) to a

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preferential claim upon the assets sequestered in this State, if the association, in defiance of the act, had continued to do business in this State after May 18, 1893. On the facts stated in the petition, the Indiana stockholders have no preferential claim upon the Indiana assets.

This court can not formulate the orders that the Delaware Circuit Court should make from time to time, and can only indicate the general lines upon which that court should proceed. Mr. James should continue to convert the Indiana assets into money. He should report his collections and disbursements and all his doings to the Delaware Circuit Court for approval. All expenses of the Indiana receivership, including the costs of this appeal, should be paid from the Indiana assets under the court's orders. Indiana stockholders should not be put to the trouble and expense of proving their claims in Illinois. The Delaware Circuit Court should see to it that the Indiana stockholders receive the same returns from the total assets that are received by stockholders of other states, and no more. To this end the Delaware Circuit Court should coöperate with the Circuit Court of the United States for the southern district of Illinois. The Indiana receivership is the elder. But Mr. MacMurray is receiver at the insolvent's domicil. As Mr. MacMurray has all the assets and claims except those in Indiana, it is suitable that distribution of the total assets to all stockholders should be made through him under orders of the court of his appointment. Mr. James should be ordered from time to turn over to Mr. MacMurray the net proceeds of the Indiana assets in order to enable Mr. MacMurray to make general distributions to all stockholders. The Delaware Circuit Court should exercise its discretion as to the times when and the conditions on which these orders shall be made, so that Indiana stockholders will be fully protected in their rights as herein declared. In brief, it is only by distributing all the assets among all the stockholders that equity can be done, and this is the guiding principle. In a

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situation like the present one, comity requires that the court of the insolvent's domicil have the lead. *Cowen v. Failey*, 149 Ind. 382; *Durward v. Jewett*, 46 La. Ann. 559, 15 South. 386; *Ware v. Supreme Sitting of Iron Hall* (N. J. Eq.), 28 Atl. 1041; *Buswell v. Supreme Sitting of Iron Hall*, 161 Mass. 224, 36 N. E. 1065, 23 L. R. A. 846; *Baldwin v. Hosmer*, 101 Mich. 119, 59 N. W. 432, 25 L. R. A. 739; *Relfe v. Rundle*, 103 U. S. 222, 26 L. ed. 337; *Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. ed. 432; *Blake v. McClung*, 176 U. S. 59, 20 Sup. Ct. 307, 44 L. ed. 371; *Sully v. American Nat. Bank*, 178 U. S. 289, 20 Sup. Ct. 935, 44 L. ed. 1072; *Taylor v. Life Assn. of America*, 13 Fed. 493; *Parsons v. Charter Oak Life Ins. Co.*, 31 Fed. 305; *Failey v. Talbee*, 55 Fed. 892; *Maynard v. Granite State Provident Assn.*, 92 Fed. 435, 34 C. C. A. 438.

Judgment reversed, with instructions to overrule the demurrer to the petition and to proceed not inconsistently with this opinion.

MANUFACTURERS GAS AND OIL COMPANY ET AL. v. THE INDIANA NATURAL GAS AND OIL COMPANY.

[No. 19,264. Filed December 11, 1900.]

NATURAL GAS.—Transportation.—Injunction.—Complaint.—Parties.

—A complaint to enjoin defendant from transporting natural gas through pipes at a pressure exceeding 800 pounds per square inch, in violation of the provisions of the act of 1891 (Acts 1891 p. 89), is insufficient where it is not shown that plaintiffs sustain any special injury peculiar to themselves by reason of the violation of the act, aside from, and independent of, the general injury to the public.

From the Grant Circuit Court. *Affirmed.*

Rollin Warner, A. W. Brady and W. A. Ketcham, for appellants.

W. O. Johnson, Foster Davis, J. C. Blackledge, C. C. Shirley, C. Wolf and M. Winfield, for appellee.

155 506
156 681

155 506
158 221

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160 232

155 506
161 448

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DOWLING, C. J.—The object of this suit was to enjoin the appellee from transporting natural gas through pipes at a pressure exceeding 300 pounds per square inch, in violation of the provisions of the act of March 4, 1891, (Acts 1891, p. 89), §§7507, 7508, 7509 Burns 1894. A demurrer to the complaint was sustained, and this ruling is assigned for error.

The principal averments of the complaint are that the appellees (with the exception of the Manufacturers Gas and Oil Company) are manufacturers; that they have invested large sums of money in their factories and business, which are situated in what is known as the gas belt of Indiana; that they have added largely to the taxable property, wealth, and population of the State; that in making their investments, they relied upon the continuance of the supply of the natural gas contained in the common reservoir described in the complaint. It is charged that the appellee is transporting natural gas from the gas field, through pipes, at a pressure exceeding 300 pounds to the square inch in contravention of the statute, and that such wrongful act is destructive of the common source of supply, and an illegal invasion of the rights of the appellants. The allegation as to the Manufacturers Gas and Oil Company is that it is the owner of gas wells in the field in which the appellee is engaged in piping gas, and that it is furnishing gas to certain of the other appellants. It is not averred that the property or gas wells of the appellants are near to the pipe lines of the appellee, or that the lives of the appellants, or of their servants and employes, or their property, are exposed to danger by reason of the excessive pressure of the gas in the appellee's pipe lines.

So much of the act of 1891 as relates to this controversy is in these words: "Be it enacted, * * * That any person or persons, firm, company or corporation engaged in drilling for, piping, transporting, using, or selling natural gas may transport or conduct the same through sound,

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wrought or cast iron casings and pipes tested to at least 400 pounds pressure to the square inch: *Provided*, such gas shall not be transported through pipes at a pressure exceeding 300 pounds per square inch, nor otherwise than by the natural pressure of the gas flowing from the wells.

“Sec. 2. It is hereby declared to be unlawful for any person or persons, firm, company or corporation to use any device for pumping or any other artificial process or appliance for the purpose, or that shall have the effect of increasing the natural flow of natural gas from any well, or of increasing or maintaining the flow of natural gas through the pipes used for conveying and transporting the same.

“Sec. 3. Any person or persons, firm, company or corporation violating any of the provisions of this act shall be fined in any sum not less than \$1,000 or more than \$10,000, and may be enjoined from conveying and transporting natural gas through pipes otherwise than in this act provided.”

The constitutionality of this statute was upheld by this court in *Jamieson v. Indiana Natural Gas and Oil Co.*, 128 Ind. 555, 12 L. R. A. 652. It was there decided that no provision of the State Constitution was violated by the act, and that it was not antagonistic to the fourteenth amendment of the federal Constitution, nor to any provision of that instrument protecting vested or contract rights.

The law was sustained upon the ground that natural gas is an inflammable, explosive, and dangerous substance, and that the enactment of the statute in question was a reasonable exercise of the police power of the State for the protection of the persons and property of its inhabitants. The injuries against which the statute attempts to provide are those resulting from the peculiar and dangerous characteristics of the gas. In the case before us, it is not alleged that any injury from this cause is threatened or apprehended. Neither is it shown that the appellants sustain, or will sus-

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tain, any special injury different from that which may be inflicted upon the public generally by reason of the violation of the act of 1891, by the appellee. In other words, the complaint fails to show a special injury to the appellants, peculiar to themselves, aside from, and independent of, the general injury to the public. High on Injunctions, §522, and cases cited in note 2.

For these reasons, the complaint in this action must be held insufficient, and the court below committed no error in sustaining a demurrer thereto.

Judgment affirmed.

MEYER ET AL. v. MEYER.

[No. 18,862. Filed December 12, 1900.]

APPEAL AND ERROR.—*Joint Assignment of Error.*—A joint assignment of error based upon the action of the court in overruling a motion for a new trial cannot be considered on appeal, where the only motion for a new trial appearing in the record was the sole and separate motion of one of the appellants.

From the Porter Circuit Court. *Affirmed.*

A. D. Bartholomew, for appellants.

Grant Crumpacker, E. D. Crumpacker, N. L. Agnew and D. E. Kelly, for appellee.

HADLEY, J.—Appellee, as plaintiff, in his suit to contest the will of Heinrich W. Meyer, made appellant, Margaretha Meyer, and ten others, defendants, alleging that said defendants were all beneficiaries under said will. Verdict and judgment that the will was void and that the probate thereof be annulled. Margaretha Meyer filed her separate motion for a new trial, which was overruled, to which ruling she excepted. In this court the only error assigned is in the following words: “Margaretha Meyer, Harry Robert Meyer [Nine other names follow.], appellants, v. Christian Meyer, appellee. The appellants say that there is manifest error in the proceedings and judgment in said

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158	509
155	569
165	331

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cause, and they specially assign the following: The court erred in overruling appellants' motion for a new trial."

The only motion for a new trial that appears in the record is the sole and separate motion of Margaretha Meyer. Her codefendants not having participated in the request for a new trial cannot be heard to complain that the motion was not granted. The error assigned is joint and not the separate assignment of Margaretha Meyer.

It is a well settled rule of appellate procedure that a joint assignment of error must be good as to all who unite in it, or it will be good as to none. Ewbank's Manual, §138; Elliott's App. Proc., §318; *Earhart v. Farmers, etc., Co.*, 148 Ind. 79.

Judgment affirmed.

WILSON v. CARRICO.

[No. 19,184. Filed December 12, 1900.]

155	570
156	597

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157	462

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158	166
158	386

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166	333

DEEDS.—Taxes.—Redemption.—Quieting Title.—Grantor conveyed certain real estate, retaining a life interest therein. Two years thereafter he conveyed the same real estate to appellee, subject to a life estate, binding appellee to make repairs and pay taxes. The former grantee conveyed the real estate to appellant, who never had possession of the land, but paid the taxes thereon for ten years, when he allowed same to become delinquent, and furnished his brother with money to purchase same at tax sale, which he did, and took the title in his own name, and afterward conveyed the land to appellee, returning part of the purchase money to appellant. All of the deeds were duly recorded within the time allowed by law except the deed to appellee, which was not recorded for sixteen years. The original grantors retained possession of the real estate until a short time before appellant brought suit to quiet title. *Held*, that the tax sale and deed vested the title in appellee, and that the same could not be assailed by appellant. *pp. 571-575.*

APPEAL AND ERROR.—Evidence.—Available error cannot be predicated upon the action of the court in excluding evidence, where the offer to prove was not made until after the objection was made and sustained. *p. 571.*

From the Sullivan Circuit Court. *Affirmed.*

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John S. Bays, for appellant.

John T. Hays, for appellee.

MONKS, J.—Action by appellant against appellee to recover possession of and quiet title to the real estate described in the complaint. This is the second appeal by appellant. *Wilson v. Carrico*, 140 Ind. 533.

The errors assigned call in question each conclusion of law and the action of the court in overruling appellant's motion for a new trial.

It appears from the special finding that Bazzle Carrico was the owner in fee simple of the lands in controversy. On November 18, 1867, Bazzle Carrico and wife, for a consideration of \$150, executed a deed conveying said lands to Elza Carrico, subject to the life estate of the grantors. November 5, 1869, said Bazzle Carrico and wife executed a deed for the same lands to appellee, subject to the life estate of the grantors. This deed was made subject to the following condition contained therein: "The aforesaid Benjamin Carrico binds himself to keep the land and farm in good repair, and to pay the customary rent and the tax on the land from this date, and furnish fire-wood, and do milling and other necessary favors that the old people may need." On March 9, 1870, Elza Carrico and wife, for a consideration of \$150, executed a deed for said lands to appellant, subject to the life estate of Bazzle Carrico and wife. Elza Carrico and wife were living with Bazzle Carrico, the father of said Elza, on November 18, 1867, when said deed was executed to said Elza. At the time of the execution of said deed by Elza Carrico and wife to appellant said Elza and wife had removed from Sullivan county, where they resided when said deed was made, and appellee was then in possession of said lands. Bazzle Carrico remained upon and occupied said real estate, until his death on September 6, 1872, and his wife remained upon and occupied said real estate thereafter until her death on January 11, 1892. Appellant never had possession of said lands,

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but paid the taxes thereon from 1870 to 1880. During the year 1881, and at all times since, appellant has been a non-resident of the State, having resided in the states of Kansas and Tennessee. In 1880, by advice of counsel, appellant did not pay the taxes for 1881 and 1882, and the same became delinquent. In 1883 said real estate was sold for said delinquent taxes by the treasurer of Sullivan county to Edgar T. Wilson, a brother of appellant, for \$35, which sum was furnished by appellant to his brother to purchase said real estate at said tax sale. That said real estate was not redeemed from said tax sale at any time, and afterwards, on March 24, 1885, the auditor of said county executed a deed for said real estate to said Edgar T. Wilson, which was duly witnessed by the county treasurer, and duly acknowledged and recorded. Afterwards, on May 28, 1886, said Edgar T. Wilson and wife, without the knowledge of appellant executed a quitclaim deed for said real estate to appellee, in consideration of which appellee paid said grantor \$60, which sum said Edgar T. Wilson paid to appellant who still retains the same. That all of the deeds mentioned were duly recorded within the time fixed by law, except the deed from Bazzle Carrico and wife to appellee, which was not recorded until sixteen years after its execution. Appellant has never executed any deed for said real estate to any one, but has continuously claimed to own the same since he received the deed for said real estate from Elza Carrico and wife.

This action was commenced March 8, 1893. The final judgment which followed the conclusions of law was that appellant take nothing by this suit, and that appellee recover from appellant his costs. It is first insisted by appellant that he is entitled to recover on the facts found, and that, therefore, the conclusions of law are erroneous. Appellant must recover, if at all, upon the strength of his own title.

None of the deeds executed by Bazzle Carrico and wife

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purported to give the grantee therein any right to possession until after his death. The first time that the grantee in any of said deeds was entitled to possession of the real estate therein described was after the death of said grantor's wife in 1892. The deed executed to Elza Carrico in 1867 was valid, and conveyed to him the real estate in controversy, subject to the life estate of the grantors. Appellee had constructive if not actual notice of this deed, for the reason that it was duly recorded within the time required by law. It follows, therefore, that the deed made in 1869 to appellee for said real estate, subject to the life estates of the grantors, conveyed no title therein to appellee, for the reason that the real estate described had been conveyed to Elza Carrico in 1867. The condition subsequent contained in the deed to appellee, that he should keep said land in good repair and pay the taxes thereon, was, therefore, without any consideration. It is true that the finding shows that appellee was in possession of said real estate on the day Elza Carrico and wife executed a deed therefor to appellant, but when, how, or under whom appellee held possession is not stated; it is also found that Bazzle Carrico lived upon and occupied said real estate until his death, and that his wife lived upon and occupied said real estate until her death. There is no finding, however, that appellee was in possession of said real estate when said taxes became delinquent, or when the land was sold for delinquent taxes, or when he received the quitclaim deed therefor from Edgar T. Wilson and paid him the consideration therefor, or that he was under any duty or obligation to any one to pay said taxes at that time.

Appellant having the burden of proof, nothing in his favor can be added by inference or intendment. The duty, if any, of the life tenants to pay the taxes on said land rested upon Bazzle Carrico and wife, who were the owners thereof. Appellee was under no obligation or duty to appellant to pay the taxes on said land. He had a legal right to purchase the same at tax sale or otherwise. The tax sale and

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deed to Edgar T. Wilson were made under the tax law of 1881, and the tax deed, therefore, *prima facie* vested in him a good and valid title to said land (*Doran v. Lupton*, 154 Ind. 396, *Richard v. Carrie*, 145 Ind. 49), and the quitclaim deed from said Wilson to appellee vested in appellee the same kind of title. It is true, that it is found that appellant furnished his brother, Edgar T. Wilson, the money to purchase said land at tax sale, and that appellant received the money paid by appellee for said quitclaim conveyance to him, but it is not found that appellee had any notice or knowledge of said facts. His rights were the same as if Edgar T. Wilson had purchased said land with his own money and on his own account. Under the facts found, the conveyance of said real estate by Edgar T. Wilson, who held the tax deed therefor, to appellee, was not a payment by appellee of the delinquent taxes for which the land was sold, or a redemption by him from said tax sale.

It is clear that appellant cannot assail the title appellee holds under said tax deed, so long as he retains the purchase money paid by appellee. It is evident that no conclusions of law could have been correctly stated upon the facts found that would have entitled appellant to recover in this action.

It is next insisted by appellant that the special findings are not sustained by sufficient evidence, and are contrary to law. One of the reasons given for this contention is that the evidence of Edgar T. Wilson shows that appellee merely intended "to release said land from the tax deed to pay the delinquent taxes". The evidence relied upon is in substance as follows: "Ben Carrico [appellee] proposed to pay me back the purchase money with interest and cost added. He paid me back the principal with interest and the penalty, and I released my claim, and that was all there was of it. I made the deed so as to release all my claim, and got \$60 for it, and sent a part to my brother, and paid the other on expenses here. I was acting for my brother, doing business for him." This evidence falls far short of showing a re-

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demption of the land from tax sale, or that it was intended by said transaction merely to pay the delinquent taxes on said land. Said evidence considered in connection with said deed executed by Edgar T. Wilson and wife to appellee shows a sale and conveyance of a *prima facie* good and valid title to said real estate.

What we have said concerning the correctness of the conclusions of law disposes of all the other reasons urged by appellant in support of the contention that the evidence is not sufficient to sustain the findings and that the same are contrary to law.

The exclusion of evidence offered by appellant is complained of as error. The bill of exceptions shows in each instance that counsel for appellant propounded a question to the witness, that appellee by counsel objected, and the court sustained the objection. After this adverse ruling by the court, counsel for appellant made his offer to prove, which was refused by the court, and there was an exception by appellant. It is established in this State that such procedure raises no question as to the admissibility of the proposed testimony. The reason therefor is fully stated in *Gunder v. Tibbitts*, 153 Ind. 591, 607, 608. The following cases declare the same rule: *Shenkenberger v. State*, 154 Ind. 630, 634, 635, and cases cited; *Siple v. State*, 154 Ind. 647, 651, 652, and cases cited; *Whitney v. State*, 154 Ind. 573, 579, 580, and cases cited; *Deal v. State*, 140 Ind. 354, 371, 372, and cases cited; *Judy v. Citizen*, 101 Ind. 18, 22.

Judgment affirmed.

MARK v. NORTH, ADMINISTRATOR, ETC.

[No. 18,917. Filed June 29, 1900. Rehearing denied Dec. 12, 1900.]

APPEALS.—Decedents' Estates.—An action by an administrator to recover possession of the assets of the estate is not an action growing out of the settlement of the estate within the meaning of §§2609, 2610 Burns 1894, requiring appeals in such cases to be perfected within thirty days, but belongs to the general class of actions, and is governed by §645 Burns 1894 as to appeals. p. 577.

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155	597
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157	462
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158	108
155	575
162	528

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LANDLORD AND TENANT.—Lease.—Decedents' Estates.—Courts.—Jurisdiction.—A lease of lands for a term of years is personal property, the title to which, upon the death of the holder, passes to his administrator, and an action may be brought by the administrator in the county in which defendant resides to set aside an assignment of the lease made by his decedent, regardless of the location of the leased premises. *pp. 577, 578.*

PLEADING.—Theory.—A complaint to set aside an assignment of a lease on the ground of unsoundness of mind of assignor is not rendered bad because of averments contained therein as to weakness of mind and fraud. *pp. 578, 579.*

SAME.—Cancellation of Instruments.—Return of Consideration.—A complaint to set aside an assignment of a lease on account of the unsoundness of the mind of the assignor, disclosing that assignor, after the assignment, went and lived with assignee until her death, is not bad for failing to aver an offer to restore to the defendant the value of the decedent's maintenance, where it was alleged that the assignment was made wholly without consideration. *p. 580.*

APPEAL AND ERROR.—Evidence.—Exceptions.—Offer to Prove.—An exception is not properly saved on the ruling of the court in excluding evidence where the offer to prove was not made until after the objection was made and sustained. *pp. 580, 581.*

From the Delaware Circuit Court. *Affirmed.*

R. S. Gregory, A. C. Silverburg and O. J. Lotz, for appellant.

E. R. Templer, C. C. Ball, J. N. Templer and C. B. Templer, for appellee.

HADLEY, J.—The appellee as administrator of Amelia H. Luther, deceased, brought this suit in the Delaware Circuit Court against the appellant, a resident of Delaware county, to set aside the assignment of a lease held by the decedent as lessee for a term of years on three camp meeting lots owned by the Indiana Association of Spiritualists, for which she had agreed to pay \$5 per annum rent, situate in Madison county, and also the assignment of two promissory notes and mortgage securing one of the same on real estate situate in Marion county, for unsoundness of mind, fraud and undue influence. Demurrer to the complaint was overruled. Trial upon the general issue; finding and judgment

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for the plaintiff. The errors assigned call in question the jurisdiction of the court over the subject-matter of the action, the sufficiency of the complaint, and the action of the court in overruling appellant's motion in arrest of judgment and for a new trial.

We are first confronted with appellee's motion to dismiss the appeal for the reason that the transcript was not filed in this court within thirty days after the filing of the appeal bond as required by §§2609, 2610 Burns 1894, §§2454, 2455 Horner 1897. The transcript was filed in this court within one year from final judgment but not within thirty days from the filing of the appeal bond.

The statutes relied upon in this motion are special provisions prescribing the procedure in the settlement of decedents' estates and apply only where probate jurisdiction is being exercised, and not to appeals in actions authorized by the code. *Koons, Adm., v. Mellett*, 121 Ind. 585, 590, 7 L. R. A. 231; *Walker, Adm., v. Steele*, 121 Ind. 436, 445; *Mason v. Roll, Ex.*, 130 Ind. 260.

This action by the administrator to recover the possession of assets of the estate, taken from the decedent by the alleged wrongful act of the defendant, did not "*grow out of a matter connected with the settlement of a decedent's estate*" and its prosecution did not invoke the exercise of probate jurisdiction, but it belongs to that general class of actions authorized by the code and might have been brought in any county and in any circuit or superior court of the State where the defendant resided (*Heller v. Clark, Adm.*, 103 Ind. 591); and is governed by §645 Burns 1894, §633 Horner 1897.

It is argued that since the lease was on lands in Madison county and the mortgage on lands in Marion county, the circuit court of Delaware county had no jurisdiction of the subject-matter of the action. We think otherwise. A lease of lands for a term of years is personal property, the title to

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which, upon the death of the holder, passes to the administrator, and not to the heirs. *Smith v. Dodds*, 35 Ind. 452, 456; *Schee v. Wiseman*, 79 Ind. 389, 392; *Cunningham v. Baxley*, 96 Ind. 367, 369.

There can be no question about the character of the notes and mortgage. An administrator succeeds to the title of his decedent in all personal property owned at the time of death. Section 2446 Burns 1894, §2291 Horner 1897, confers upon an administrator full power to maintain any suit, in any court of competent jurisdiction, for the recovery of possession of any personal property of the estate. Section 314 Burns 1894, §312 Horner 1897, provides that all actions except those before specified shall be brought in the county where the defendants or one of them resides. This action was brought in the county where the estate is pending, where the assignment complained of was made, where the defendant resides, and where she holds in possession the property in controversy.

The gist of the action is to recover the possession of personal property, assets of the estate. The ownership of the chattels is the real question. The validity of the assignment is an incident. In no sense does the action affect the integrity of the lease and mortgage themselves, or the rights of the lessor and mortgagor. The Delaware Circuit Court had jurisdiction. *Tyler v. Wilkerson*, 20 Ind. 473; *Galentine v. Wood, Adm.*, 137 Ind. 532, 536.

The sufficiency of the complaint to state a cause of action is challenged by demurrer and by motion in arrest of judgment. Among a large amount of historical and useless matter, it is alleged in the complaint that the plaintiff's decedent "on the 15th day of November, 1897, assigned and delivered, wholly without consideration, to the defendant" the certain notes, mortgage, and lease, and that at the time of said assignment "the said Amelia H. Luther was an old woman, feeble in body and of unsound mind, and incapable of managing her estate and of making a contract, as the de-

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fendant then well knew and long had well known, and the said Amelia continued from the time of making said assignment to the time of her death a person of unsound mind and incapable of entering into a contract or of managing her estate, as the defendant well knew and still well knows."

The complaint also abounds with averments of weakness of mind and fraud. And notice of disaffirmance by the plaintiff in his representative capacity, on the ground of the mental unsoundness of his decedent, is also alleged. The only question presented by the demurrer and by the record is: Does the complaint state facts sufficient to constitute a cause of action?

The objection that the complaint does not count upon any definite and certain theory is without substantial merit. The complaint is clearly grounded upon the unsoundness of mind of the decedent and unquestionably states a good cause of action upon that ground; and the averments of weakness of mind and fraud, even if sufficient to state another cause of action upon this ground, will not accomplish the overthrow of the former.

A complaint is good upon demurrer for insufficient facts, if from all its averments it states a single good cause of action. It is still good if it states a dozen. If the defendant had been in doubt, before trial, as to the theory of the complaint, it would then have been an easy matter to clear the doubt away by a demurrer for misjoinder or by a motion to separate into paragraphs; and her failure to do either removes all just ground for complaint.

It was alleged in the complaint that Mrs. Luther had for many years been an ardent believer in spiritualism and a public lecturer of national repute upon spiritualistic subjects; and the defendant, professing herself to be a spiritualist and a medium, and an acquaintance and friend of Mrs. Luther, by certain specified false and fraudulent representations, induced Mrs. Luther to make the said assignment of the notes, mortgage, and lease, and to deed to de-

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fendant certain real estate and to quit the home which she then had with a granddaughter and go with the defendant and make her home with the latter for the remainder of her life and to receive from defendant care and maintenance and protection against evil influences; that, being so induced by the defendant, Mrs. Luther removed to the defendant's home, taking with her all her personal belongings, and on November 15, 1897, pretended to execute said assignment and deed and continued to live with the defendant to the 26th day of December following, when she died.

Appellant further insists that the complaint is bad for want of an averment that the plaintiff had tendered or offered to restore to the defendant the value of the decedent's maintenance from November 15th to December 26th.

Under the positive averment that said assignment was made wholly without consideration, we think the allegations of the complaint, with respect to the decedent's going to and remaining with the defendant till her death, must be construed, not as stating a consideration received for the assignment, but merely as setting forth a part of the scheme pursued by the defendant to bring and keep the decedent subject to her will; and can not therefore be considered as going to the merits of the complaint.

Appellant complains of the ruling of the court in excluding certain testimony by Dr. Whitney. The record shows the following: "Q. Have you ever had any talk with her (Mrs. Luther) about her business or property? If so, tell the court what it was and what was said." To which question the plaintiff objected and the court sustained the objection. "To which ruling of the court the defendant at the time excepted." After having entered her exception to the ruling of the court, the defendant proceeded to state the facts she proposed to elicit by the question; and the record proceeds: "To which the plaintiff objects. Thereupon the court sustained the plaintiff's objection, to which ruling of the court the defendant by counsel at the time excepted."

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The precise question arising here was before the court in *Gunder v. Tibbits*, 153 Ind. 591, at page 607, where it was held, following many decisions of this court there cited, that such procedure presents no question for review. The principle is this: When objection is made to a question, it forms an issue upon the propriety of the question, and when the court rules upon the issue thus formed the incident is closed. A subsequent offer to prove goes for nothing because the question is no longer open. To make an offer to prove effective, it should follow immediately after the adversary's objection, and before the court has ruled. When thus timely made, it enables the court to rule advisedly upon the pending question; and when postponed until after the ruling, it can serve no useful purpose, and presents no question for further consideration. See, also, *Rinkenberger v. Meyer*, ante, 152; *Whitney v. State*, 154 Ind. 573, and cases cited.

We find no available error in the record. Judgment affirmed. Baker, C. J., did not participate.

THE SECOND NATIONAL BANK OF AKRON, OHIO, v.
THE MIDLAND STEEL COMPANY.

[No. 19,220. Filed December 13, 1900.]

BILLS AND NOTES.—Signatures.—Evidence.—In an action against a corporation by an indorsee on a promissory note it appeared that the name of the corporation was printed at the head of the note, and that the note was signed by an individual with the word "President" following the name. The complaint alleged that the person who signed the note was the president of the company; that the note was executed by the company, through such person as president, for a debt owing by the company to the payee, and that the payee accepted the same as the note of the company. *Held*, that extrinsic evidence was admissible to explain the instrument.

From the Delaware Circuit Court. *Reversed*.

C. S. Cobbs, Rollin Warner and A. W. Brady, for appellant.

J. W. Ryan, W. A. Thompson, W. A. Ketcham, B. K. Elliott, W. F. Elliott and F. L. Littleton, for appellee.

155	581
1157	702
155	581
1162	673
1162	675

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DOWLING, C. J. —This case was transferred to this court by the order of the Appellate Court.

The appellant, an indorsee, sued the appellee upon a promissory note of which the following is a copy: "Midland Steel Company. Muncie, Ind., April 13, 1896. Three months after date, we promise to pay to the order of the Muncie Land Company \$2,000, value received, negotiable and payable, without defalcation or discount, at Union National Bank, Pittsburg, Pa., with interest at six per cent. per annum. R. J. Beatty, President."

The complaint was in seven paragraphs. The *first* alleged, in general terms, that the appellee executed the note sued on. The *second* averred that the appellee executed the said note through one R. J. Beatty, who was at the time the president, general agent, and general manager of the appellee, and who, in executing the note, acted by appellee's authority, and on its behalf, as such president, etc., and not personally; that the sole consideration of said note was a debt of \$2,000 then due from and owing by the appellee, alone, to the Muncie Land Company, which indorsed said note to the appellant. The *third* paragraph charged that the appellee executed said note by the name of R. J. Beatty, president. The *fourth* paragraph stated that the appellee had adopted and used as its name in the execution of negotiable promissory notes, etc., the name of R. J. Beatty, president, and by that name executed the note mentioned in the complaint. The allegation of the *fifth* paragraph was that the appellee executed the note under the name of R. J. Beatty, president, and that the note so executed was received, and accepted by the appellant as the note of the appellee. The *sixth* paragraph is the same as the *fifth* with the additional averments, however, that the note was executed for a debt due and owing from the appellee to the Muncie Land Company, and for no other consideration; that said note was executed by the appellee through one R. J. Beatty, who was, at the time, the president, general agent, and general man-

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ager of the appellee, who acted by authority of the appellee, on its behalf, as its president, etc., and not personally; and that when the Muncie Land Company indorsed and delivered said note to appellant, it notified appellant that said note was the note of the appellee executed under the name of R. J. Beatty, president, and that appellant received it as such note of the appellee, and not otherwise. The *seventh* paragraph avers that, on the day of the execution of the note sued on, and long prior thereto, the appellee had adopted and used in the execution of its notes, drafts, etc., the name of R. J. Beatty; that, on said day, the appellee, by the description of "R. J. Beatty, president," executed to the Muncie Land Company the said note, whereby it, the said appellee, promised to pay said Land Company, three months thereafter, \$2,000, with interest, etc., and that the Muncie Land Company received and accepted the same as the note of the appellee, and of no other person; that said note was given and executed for a debt of \$2,000, owing from the appellee to the Muncie Land Company, and for no other consideration; that the said note was executed by the appellee, through one R. J. Beatty, who was the president, general agent, and general manager of the appellee, and who acted by the authority of the appellee and on its behalf in executing said note as such president, agent, etc., and not personally, or in any other capacity; that said Beatty intended to execute said note in such manner that it would be the note and obligation of the Midland Steel Company, and of no other person; that said Muncie Land Company accepted said note in the belief that it was the note and obligation of the appellee, and not the note of any other person, and that if said note is not the note of the said corporation such fact is due to the mutual mistake of the said R. J. Beatty and said Muncie Land Company; that the appellant accepted said note at the time it was indorsed to said appellant as the note and obligation of the appellee, and not otherwise, and that said note should, if found defective, be reformed so as to express the true intent of the parties.

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Each paragraph avers the indorsement of the note by the Muncie Land Company to the appellant. It is also alleged that by the law of the state of Pennsylvania, where the said note is payable, it is negotiable as bills of exchange are negotiable, and that no grace is allowed. A copy of the note is properly made an exhibit.

Prayer for judgment, the reformation of the instrument sued on, and all other proper relief. Demurrers to the several paragraphs of the complaint were sustained, and, the appellant refusing to plead further, judgment was rendered for appellee. The rulings on the demurrers are assigned for error.

Must the instrument set out in the complaint be conclusively presumed the personal obligation of R. J. Beatty, whose name is subscribed to it, or, under proper averments, may it be shown by parol evidence to be the contract of the appellee, the Midland Steel Company?

It is irregular in form, and ambiguous in its terms. The name of the Midland Steel Company is not subscribed to it, neither does the name of that corporation appear in the body of the contract. The instrument reads, "We promise to pay, etc.," but the plural pronoun "we," in the first person, cannot properly be used by a corporation. The name of the company appears on the instrument above the line in which are written the place and date of execution.

The signature to the instrument is "R. J. Beatty, president." It is not stated of what corporation Mr. Beatty is president, or on whose behalf, or as whose agent he signs the paper. The words 'we promise to pay,' are not grammatically correct, if it is understood that Beatty is the sole promisor.

Men do not usually describe themselves as president, secretary, treasurer, trustee, or agent, when signing their personal contracts by which they intend to bind themselves as individuals. If negotiable paper executed in this manner may be shown by proof of extrinsic circumstances to be the

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contract of a corporation, or of any unnamed principal, then it may be suggested that an indorsee of such instrument might be left in doubt as to the identity of his debtor. On the other hand, it may be said that if the description of the person signing the paper must be disregarded, and if the instrument is to be conclusively presumed the contract of the person whose name is subscribed to it, then, in many cases, the person so signing would find himself personally liable for the debt of another, while the holder of the instrument might discover in an action upon it that, instead of having, as he supposed, the obligation of a solvent corporation or person, he held only the personal note of an irresponsible officer or agent of such corporation or person. In the usual course of business in this country, the addition of a title, or description of any kind is not customary,—indeed, it may be said that such addition or description is *never* appended,—when men sign their names to contracts by which they intend to bind themselves in their own proper persons, and not as the representatives of another. Again, it is to be observed that such additions and descriptions as president, secretary, treasurer, trustee, agent, and the like, plainly import a relation to some other person, as a principal, distinct from the person subscribing the instrument. Besides, the appearance of such description of the party signing the instrument is sufficient, in fact, to apprise the other party that the person so signing his name and describing himself, is not the principal in the transaction, but, that another, disclosed or undisclosed, is the real party in interest; or, at least, such addition or description is sufficient, in fact, to put the other party upon inquiry, both as to the identity of the real principal and the authority of the agent to bind him. We do not mean to assert here, however, the sufficiency in law of every such indication that the paper is executed in a representative capacity only.

The decisions in this State upon the question presented here cannot easily be reconciled or distinguished. Among

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those holding that extrinsic evidence is not admissible to show that a contract executed by one who adds to his signature the words president, secretary, agent, trustee, etc., is not the contract of the person so signing, but the obligation of another party are the following: *Prather v. Ross*, 17 Ind. 495; *Kendall v. Morton*, 21 Ind. 205; *Wiley v. Shank*, 4 Blackf. 420; *Mears v. Graham*, 8 Blackf. 144; *Hays v. Crutcher*, 54 Ind. 260; *Williams v. Second Nat. Bank*, 83 Ind. 237; *Willson v. Nicholson*, 61 Ind. 241; *Hayes v. Brubaker*, 65 Ind. 27; *Avery v. Dougherty*, 102 Ind. 443; *Hobbs v. Cowden*, 20 Ind. 310; *Jackson School Tp. v. Farlow*, 75 Ind. 118, 123.

A different view seems to have been taken in other cases. *Means v. Swormstedt*, 32 Ind. 87; *McHenry v. Duffield*, 7 Blackf. 41; *Pitman v. Kintner*, 5 Blackf. 250, 33 Am. Dec. 330; *Kenyon v. Williams*, 19 Ind. 44; *Bingham v. Kimball*, 17 Ind. 396; *Indiana, etc., R. Co. v. Davis*, 20 Ind. 6; *Gaff v. Theis*, 33 Ind. 307; *Vater v. Lewis*, 36 Ind. 288; *Pearse v. Welborn*, 42 Ind. 331; *Neptune, Adm., v. Paxton, Rec.*, 15 Ind. App. 284; *Louisville, etc., R. Co. v. Caldwell*, 98 Ind. 245; *Second Baptist Church v. Furber*, 109 Ind. 492, 496; *Swarts v. Cohen*, 11 Ind. App. 20; *Hunt v. Listenberger*, 14 Ind. App. 320.

In reviewing the cases in this State, it will be observed that the court, while adhering to the rule that the words affixed to the names of the persons signing an instrument are to be treated as mere *descriptio personarum*, deprecates the doctrine as an unreasonable one, and holds, whenever possible, that when the contract itself shows that the words were not merely descriptive of the person, they will not be so regarded.

Many exceptions to the rule contended for by the appellee in this case are generally recognized.

It does not apply to contracts executed by public officers in the discharge of official duties. 1 Am. & Eng. Ency. of Law (2nd ed.) 1056, and cases cited in note 2; *Macbeath*

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v. *Haldimand*, 1 Durn. & East 172; *Sparta School Tp. v. Mendell*, 138 Ind. 188. Nor to instruments executed by bank officers on behalf of a bank. *Bank of State, v. Wheeler*, 21 Ind. 90; *Board, etc., v. Butterworth*, 17 Ind. 129; *Baldwin v. Bank of Newbury*, 1 Wall. 234, 17 L. ed. 534; *Nave v. First Nat. Bank*, 87 Ind. 204; *Commercial Bank v. French*, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; *Watervliet Bank v. White*, 1 Denio (N. Y.) 608; *Houghton v. First Nat. Bank*, 26 Wis. 663. Nor to simple contracts for the performance of agreements other than the payment of money. *Deming v. Bullitt*, 1 Blackf. 241; *Avery v. Dougherty*, 102 Ind. 443, 52 Am. Rep. 680; *Whitney v. Wyman*, 101 U. S. 392, 25 L. ed. 1050; *Post v. Pearson*, 108 U. S. 418, 27 L. ed. 774.

It is said by Mr. Freeman in his note upon *Greenburg v. Whitcomb Lumber Co.*, 90 Wis. 225, 63 N. W. 93, 28 L. R. A. 439, 48 Am. St. 911 on p. 919, that, "Upon principle, the true question for consideration in every case is, or, at least, ought to be, whether, taking the writing as a whole, it sufficiently appears therefrom that it is intended to be binding upon the corporation rather than upon the agent who has signed it. It is not at all usual for a person, executing a note or other contract, to add words descriptive of himself, or to refer to his relation to other persons, whether natural or artificial, who have no connection with the transaction, and, when he designates his representative capacity, to assume that such designation was intended merely as a description of himself is to assume something which is rarely, and perhaps never, in harmony with the facts. Of course, if he only describes himself as an agent or officer without indicating who his principal is, the instrument must necessarily be accepted as the obligation of the agent, or treated as void for want of a designated obligor. If, on the other hand, he, upon the face of the writing, discloses not only that he is an agent or officer, but also of whom he is such agent or officer, we must be astute to mis-

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apprehend, or else we must concede that he has employed language better calculated to evidence the obligation of his principal than of himself. There is a growing inclination to consider an instrument as it would manifestly be understood by the average business man, or, in other words, as it was most probably understood by the party receiving and the party signing it, and to exonerate the latter from liability, when, according to such construction, it appears to the court that he did not intend, and was not understood, to bind himself, but to act for the corporation of which he was the authorized agent. *Despatch, etc., Co. v. Bellamy, etc., Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Magill v. Hinsdale*, 6 Conn. 464, 16 Am. Dec. 70; *Smith v. Alexander*, 31 Mo. 193; *McClellan v. Reynolds*, 49 Mo. 312; *Pratt v. Beaupre*, 13 Minn. 187; *Johnson v. Smith*, 21 Conn. 627; *Wyman v. Gray*, 7 Harr. & J. 409; *Means v. Swormstedt*, 32 Ind. 87, 2 Am. Rep. 330; *Vater v. Lewis*, 36 Ind. 288, 10 Am. Rep. 29; *Farmers, etc., Bank v. Colby*, 64 Cal. 352, 28 Pac. 118." See also the very clear and full statement of the modern doctrine on this subject in 4 Thomp. on Cor. §5141 *et seq.*

In *Carpenter v. Farnsworth*, 106 Mass. 561, 8 Am. Rep. 360, a check had "Aetna Mills" printed on the margin, was signed "T. D. F., Treas.," and was given for the debt of the mills. It was held not to bind F. personally. Gray, J., "the court has always laid hold of any indication on the face of the paper, however informally expressed, to enable it to carry out the intention of the parties."

In *Roberts v. Austin*, 5 Wharton (Pa.) 313, the action was brought by the payee against the drawer of a bill of exchange, signed by the latter in his own name merely. Parol evidence was admitted to show that the drawer was agent of the drawee, and had given the bill in the business of the latter, and that the payee knew the facts when he received the bill.

In *Moore v. McClure*, 8 Hun 557, parol evidence was

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held admissible to charge the principal on a note signed "A. B., Agent." The court said: "The fact that the name of the principal does not appear on the face of the note is not, under the modern decisions in this State, at all conclusive. If it was intended to be given in the business of the principal, was in fact so given, and with due authority, it is binding on the principal, and all this is matter of evidence."

In *Hicks v. Hinde*, 9 Barb. 528, a draft in favor of the plaintiff was signed, "John Hinde, Agent," and extrinsic evidence was admitted to discharge Hinde from liability.

In *Scanlan v. Keith*, 102 Ill. 634, 40 Am. Rep. 624, the court say: "Where a party signs his name as cashier or agent for a banking, railroad or other corporation, in drawing drafts or bills, or in accepting drafts or other evidences of indebtedness, in its ordinary business, if it appears, or is made to appear, it is the obligation of the corporation, and the cashier or agent or other officer had authority to bind the corporation, he is not personally liable, and the facts may be shown by extrinsic evidence." See, also, *Hypes v. Griffin*, 89 Ill. 134, 31 Am. Rep. 71; *Merchants Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665.

In *Baldwin v. Bank of Newbury*, 1 Wall. 234, 17 L. ed. 534, the court by Clifford, Justice, quote with approbation the opinion of Johnson, Justice, in *Mechanics Bank v. Bank of Columbia*, 5 Wheat. 326, 5 L. ed. 100, in which it was said: "It is by no means true, as was contended in argument, that the acts of agents derive their validity from professing, on the face of them, to have been done in the exercise of their agency." Rules of form, in certain cases, have been prescribed by law, and where that is so, those rules must in general be followed, but in the diversified duties of a general agent, the liability of the principal depends upon the fact that the act was done in the exercise and within the limits of the powers delegated, and those powers are necessarily inquirable into by the court and jury. Maker of the note in that case had signed his name without

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any addition to indicate his agency, which makes the case a stronger one than the one under consideration. Same rule as applied to ordinary simple contracts has since that time been fully adopted by this court. Examples of the kind are to be found in the case of the *New Jersey Steam Navigation Co. v. Merchants Bank*, 6 How. 381, 12 L. ed. 465, and in the more recent case of *Ford v. Williams*, 21 How. 289, 16 L. ed. 36, where the opinion was given by Mr. Justice Grier. In the latter case, it is said that the contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein. Parol proof may be admitted to show the real nature of the transaction, and it is there held that the admission of such proof does not contradict the instrument, but only explains the transaction."

"Where the principal's name appears printed in the margin or head of a bill or note executed by an agent, the former is sufficiently designated to put a prudent man upon enquiry, and to take the case out of the rule in regard to an undisclosed principal." 1 Am. & Eng. Ency. of Law (2nd ed.) 1047, and cases cited in notes.

In the case before us, the Midland Steel Company is named in the instrument sued on. There is nothing to indicate that the name of the company is outside of the note, or that it was not written in, and intended to form a part of it. The complaint avers that the note was given by the Midland Steel Company, and, in some of its paragraphs that it was given for a debt owing by the Midland Steel Company to the ~~Midland~~ Land Company, and for no other consideration; that it was intended to be the note of the appellee, and was so received, and that the appellant took it from the payee with that understanding. Under these circumstances we think it may properly be treated as the note of the Midland Steel Company, and not as the obligation of the person who signed his name to it as the president of that corporation. In view of the fact that an indorsee is seeking

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to charge the Midland Steel Company as the maker, and, as the indorsee alleges, that it took the note with notice that Beatty, whose name was subscribed to it as president, was not bound, we think it unimportant whether the note was negotiable as a bill of exchange, or otherwise. If the appellee is correct in its contention that the instrument was not negotiable as a bill of exchange, then it was a simple contract for the payment of money and, according to the authorities, the rule as to the admissibility of parol evidence to explain its true character is less stringent. It is also a fact of some importance in the case that the party attempting to escape liability is the one who is alleged to be the real debtor, and who received the full consideration for which the note was executed, and not the officer or agent who undertook to execute it in his representative capacity and who derived no personal benefit from the transaction.

The form of the instrument sued on is not such as to require the court to presume, conclusively, that it is the obligation of R. J. Beatty. Extrinsic evidence is admissible to explain the instrument, and to show that it was intended and understood by the parties to be the note of the Midland Steel Company.

The averments of each paragraph of the complaint were sufficient to authorize such proof, and to fix the liability intended to be created by the instrument where it properly and justly belongs. The previous decisions of this court inconsistent with the views expressed in this opinion are overruled.

The judgment is reversed, with instructions to the court to overrule the demurrers to the several paragraphs of the complaint, and for further proceedings in accordance with this opinion.

Calvert v. Hendricks.

CALVERT v. HENDRICKS ET AL.

[No. 19,246. Filed December 14, 1900.]

JUSTICES OF THE PEACE.—*Judgments.—Injunction.*—An action can not be maintained to have a judgment rendered by a justice of the peace declared void, and to enjoin the issuance of an execution thereon, because of irregularities, since the statute granting an appeal furnishes an adequate legal remedy.

From the Boone Circuit Court. *Affirmed.*

A. J. Shelby, for appellant.

D. J. McMath, Allen Stahl, H. H. Griffin and Samuel Griffin, for appellees.

BAKER, J.—Suit by appellant to have a judgment declared void, and to enjoin the issuance of an execution. Demurrer to the complaint sustained. Upon appellant's refusal to amend, judgment was rendered. The error assigned is that the court erred in sustaining the demurrer.

The complaint avers these facts to be true: On June 11, 1898, appellee Lemuel W. Harris filed with appellee Hendricks, a justice of the peace of Marion township, Boone county, Indiana, a complaint, asking for \$200 damages against appellant for an alleged assault and battery. The cause was set for hearing on June 15, 1898, and appellant was summoned to appear. Appellant appeared in person and by attorney and, his demurrer to the complaint being overruled, demanded a jury, which was impaneled and sworn to try the cause. During the progress of the trial it was discovered that appellee Lemuel W. Harris was a minor, whereupon appellant moved to dismiss the case. Appellee G. B. Harris signed a written statement wherein he consented to appear as next friend and be responsible for costs and the motion to dismiss was overruled. Thereafter, upon motion of Harris, the justice discharged the jury, over the objection of appellant, and heard the case without

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a jury, and rendered judgment against appellant for \$200 and costs. Appellees are threatening to issue an execution and to levy upon the goods and chattels of appellant to satisfy the judgment.

These facts show that the justice had jurisdiction of the subject-matter and of the person of appellant, unless he lost jurisdiction by reason of what occurred after appellant appeared. The impaneling of a jury did not deprive the justice of his judicial powers as the presiding officer of the court. It is unnecessary to review the grounds of the motion to withdraw the case from the jury, because it was within the power and it was the duty of the justice to pass upon the motion, and his action, however erroneous, was not void. In *Boatz v. Berg*, 51 Mich. 8, 16 N. W. 184, relied upon by appellant, the defendant had demanded a jury and paid the required fee. The justice proceeded to try the cause without a jury, "against defendant's objection and without his consent". The court affirmed the judgment of the circuit court holding, on *certiorari*, that the judgment of the justice was erroneous,—not void. If appellant desired to avoid the judgment, he should have done so by appeal. The mode of taking an appeal and relieving a party from a judgment rendered against him before a justice of the peace is prescribed by statute, and furnishes an adequate legal remedy. §§1567-1571 Burns 1894, §§1499-1503 R. S. 1881 and Horner 1897; *Baragree v. Cronkhite*, 33 Ind. 192; *Boyd v. Weaver*, 134 Ind. 266.

Judgment affirmed.

THE STATE, EX REL. REPP ET AL. v. COX, JUDGE OF THE
MIAMI CIRCUIT COURT.

[No. 19,816. Filed December 14, 1900.]

MANDAMUS.—*Bill of Exceptions.—Presumption.*—In an action in mandamus to require a trial judge to sign a bill of exceptions tendered him, all presumptions are in favor of the action of the court,

155	593
156	44
155	593
157	462
155	593
158	166
158	454
155	593
162	601
155	593
165	561

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and, in the absence of the evidence given at the hearing of the motion, it will be presumed that the action of the trial court was correct. *pp.* 594, 595.

EVIDENCE.—Offer to Prove.—Review.—In order to present any question as to the ruling of the court in sustaining an objection to a question propounded to a witness, a statement of the evidence which the witness will give in answer to the question must be made. *p.* 596.

SAME.—Exception.—Offer to Prove.—No question is presented on the ruling of the court in excluding evidence where the offer to prove was not made until after the objection was made and sustained. *p.* 596.

MANDAMUS.—Bill of Exceptions.—Defects.—An action will not lie to compel the judge of a trial court to sign a bill of exceptions, where it is apparent from the bill that it cannot benefit the person applying for it, or would be useless if signed. *p.* 597.

From the Miami Circuit Court. *Application for writ of Mandamus denied.*

E. S. Morris, for relator.

W. C. Bailey and *C. A. Cole*, for respondent.

MONKS, J.—The relators are appellants in the case of *Sarah A. Repp, et al., v. Sarah K. Leshner, et al.*, pending in this court, and seek by mandate to compel the Hon. Jabez T. Cox, judge of the Miami Circuit Court, to sign a bill of exceptions tendered to him in that case.

It appears from the petition and return that the motion for a new trial in said cause was overruled on October 22, 1898, and ninety days given in which to file a bill of exceptions, and on January 17, 1899, the relators who were the plaintiffs in said action tendered said judge a bill of exceptions, and asked that the same be signed and made a part of the record. The date of the presentation was stated in the bill. Said judge was at that time engaged in the trial of a cause and had not the time to examine said bill, and suggested to counsel for relators, that he submit the same to the attorneys representing the other side in said cause, and that said counsel then took said bill of exceptions away from the court room. Said judge did not again see said bill of exceptions, nor did any one ask him to sign said

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bill, until about the 12th day of October, 1899. That long after said bill of exceptions had been presented to the judge, and taken away by counsel for the relators, said counsel discovered that said bill was not correct, and on October 12, 1899, filed and presented a written motion and affidavit praying that said bill be corrected, signed, and made a part of the record. Notice of said motion was served upon the attorneys of the defendants in said cause. Said motion was heard and overruled by the court on the 20th day of October 1899, and among the reasons given therefor was "that, considering all the evidence given, it was clearly shown that appellants had used no diligence in preparing and presenting a correct bill of exceptions, and that the effect of permitting the additions asked for would be in effect extending the time for filing said bill many months beyond the time given, which the court had no power to do."

It is said in High on Ex. Leg. Rem. §204: "Whether there has been such laches and delay as to justify a court in refusing to settle the bill is a judicial question, to be determined upon the facts shown to the court before which the cause was tried, and its decision upon this question will not be controlled by mandamus, in the absence of any abuse of judicial discretion." See, also, 13 Ency. Pl. & Pr. 583, 584.

All presumptions are in favor of the correctness of the action of the trial court, whether or not the evidence given at the hearing of said motion shows an abuse of judicial discretion on the part of the trial court in reference to the bill we cannot say, for the reason that the same is not before us. In the absence of the evidence, we must presume that the action of the trial court was correct.

There is another reason why the application for a mandate must be denied. The bill of exceptions tendered to the judge, and the motion to correct the same, made on October 21, 1899, which are made a part of the application in this case, show that the action of the court in sustaining

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objections to the testimony of three of the plaintiff's witnesses in said action, were the only rulings of the court sought to be made a part of the record by said bill as asked to be corrected by said motion. Martin Leshner, one of the plaintiffs in said action, and a relator in this, was called as a witness to testify in behalf of the plaintiffs, and it was disclosed by his examination that he was a son of John Leshner, deceased. Counsel for plaintiffs propounded a question to him in regard to a matter which occurred in the lifetime of his said father, to which counsel for the defendants objected, on the ground that the "action was by heirs involving a contract made by their ancestor, and under the statute, the witness is not competent to testify to any matter which occurred previous to the death of his ancestor"; which objection was sustained by the court, and plaintiffs excepted. No statement was made by counsel for plaintiffs, what they proposed to prove by said witness in answer to said question. Sarah A. Repp, a plaintiff in said action and a relator in this, was also called as a witness on behalf of plaintiffs, and a similar question propounded to her, and a like objection made and sustained. No offer to prove was made.

It is settled that when a question is objected to or a witness challenged as incompetent, in order to present any question for review, a statement of the evidence which the witness will give in answer to said question must be made. Sustaining the objection to the competency of said witness, even if the witness is competent, was not harmful or prejudicial to the relators, unless the testimony of the witness in answer to said question would have been competent and material. This could only be disclosed, if at all, by an offer to prove. Elliott's App. Proc. §§742, 743; 2 Elliott's Gen. Prac. §587.

The husband of another plaintiff in said action and a relator in this was called as a witness for plaintiffs, and a question propounded to him in regard to matters which

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occurred prior to the death of John Leshar, his wife's father, to which counsel for defendants made a like objection, as in the case of the other witnesses named, which was sustained by the court. Then followed an offer to prove, to which the court sustained an objection.

That no question is presented by such procedure is well settled. *Wilson v. Carrico*, ante, 570; *Mark v. North, Adm.*, ante, 575; *Gardner v. Tibbits*, 153 Ind. 591, 607, 608; *Shenkenberger v. State*, 154 Ind. 630, 634, 635; *Siple v. State*, 154 Ind. 647, 651, 652; *Deal v. State*, 140 Ind. 354, 371, 372; *Judy v. Citizen*, 101 Ind. 18, 22.

It is evident, therefore, that if the trial judge should sign said bill as originally presented or as requested in the motion to correct the same, it would be of no benefit to the relators. Said bill, if signed, would not show any reversible error, or present any questions for review, in the case of *Repp, et al., v. Leshar, et al.*, pending in this court. It is settled that mandamus will not lie when it is apparent from the bill that it cannot benefit the persons applying for it, or when it would be useless if signed. *Borchus v. Sayler*, 90 Ind. 439; *High on Ex. Leg. Rem.*, §§14, 204a, 246; *Pitts v. Hall*, 60 Ga. 389; *People v. Rice*, 129 N. Y. 391, 29 N. E. 355; *Taylor v. McPheters*, 111 Mass. 351; *Faust v. Calhoun Circuit Judge*, 30 Mich. 266; *Tennant v. Crocker*, 85 Mich. 328, 48 N. W. 577; *Clark v. Crane*, 57 Cal. 629, 29 Pac. 241; *James v. Superior Court*, 78 Cal. 107; *Lake v. King*, 16 Nev. 215, 217; *People v. Smath*, 51 Ill. 177; 13 Ency. Pl. & Pr. 578, 579.

The writ is therefore denied.

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[No. 18,786. Filed December 18, 1900.]

MORTGAGES.—Deeds.—Evidence.—A deed, although absolute on its face, will be treated as a mortgage if in fact it was received as security for the repayment of money, and evidence, written or oral, is admissible to show such facts. p. 602.

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MORTGAGES.—Deeds.—Special Finding.—A finding in a partition proceeding that on and prior to the date of a certain deed upon which plaintiff's title to the real estate in question depended the grantor was indebted to the grantee for borrowed money and said deed was executed as security for the same, but without the knowledge of grantee, was sufficient to support a conclusion of law treating the deed as a mortgage when considered in connection with the further finding that the grantee took the deed as security for said indebtedness. *pp. 602, 603.*

SAME.—Deeds.—Limitation of Actions.—Where a deed absolute on its face was intended as a mortgage, and the persons claiming title thereunder never occupied the land, a mere lapse of time will not bar the right to assert and show that the deed was in fact a mortgage, in defense of an action to enforce the rights of the parties under such deed. *pp. 603, 604.*

From the White Circuit Court. *Affirmed.*

A. W. Reynolds, A. K. Sills, B. K. Elliott, W. F. Elliott and *F. L. Littleton*, for appellant.

E. B. Sellers and *W. E. Uhl*, for appellees.

MONKS, J.—This action was brought December 31, 1895, for partition of the real estate described in the complaint. It was alleged that appellant was the owner of the undivided two thirds of said real estate, and appellees, Alfred V. C. Johnson and Grace Johnson were the owners of the undivided one-third thereof, and that the other appellees claim an interest in or lien on said real estate, the nature of which is unknown to appellant, and they are made parties to answer as to their interest.

All who were defendants at the trial were defaulted, except appellees, Fiske and Beem, who filed an answer. *W. A. Bushnell*, guardian *ad litem*, for Grace Johnson, a minor, also filed an answer.

The court made a special finding of facts and stated conclusions of law thereon to the effect that appellant had no interest in said real estate as tenant in common, and that she was not entitled to partition of said real estate, and was not entitled to recover in the action. Judgment thereon that appellant take nothing by her said action, and that appel-

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lees recover their costs. The only errors properly assigned call in question the conclusions of law.

The view we take of the case renders it unnecessary to set out any of the findings except those which it is claimed show title in appellant. We omit, therefore, all findings in regard to the title of appellees to the real estate in controversy.

It appears from the facts found that Jonathan Richey was, in 1854, the owner of the east half of section six, township twenty-eight north, range four west, in White county, Indiana, the land described in the complaint. On August 11, 1854, said Richey and his wife, Lucetta J. Richey, conveyed the same by warranty deed to a railroad company, which deed was duly recorded April 18, 1855. March 22, 1855, the railroad company conveyed all of said section six to Joseph A. Wright, in trust for said company and John M. Wright of Logansport, to be applied in payment to said Wright for money to be expended and work to be done in the performance of his contract for the completion of the road of said company, and said trustee was to convey said real estate to such persons as the said Wright should designate. Said trust deed was duly recorded in the mortgage records of White county, September 24, 1857. On August 31, 1857, Joseph A. Wright, as trustee for said railroad company and John M. Wright, by deed of general warranty conveyed said section six to John Green, which deed was duly recorded in the deed records of said county, September 5, 1857. January 21, 1858, said John Green executed and acknowledged a writing, in which he declared he held the land in controversy in this action and other lands in trust for such uses and purposes as John M. Wright might indicate. After he was fully indemnified for any and all liabilities he was under where said Wright was his surety, or the surety of John M. Wright & Co., or John Green & Co., or otherwise, and after he was fully paid all just sums, said Wright then or thereafter might owe him as long as he

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held the title to said property, and as said Wright ordered him to hold said property to the uses and purposes as John M. Corwine might indicate to him in writing after the trust therein specified was accomplished and fulfilled, said Corwine being the owner thereof subject to the provisions aforesaid; and that said Green held said property subject to the conditions aforesaid, solely for the use and profit of said Corwine, or such use as he might indicate. This declaration of trust was duly recorded in the deed records of said county February 18, 1858. On November 28, 1860, said John Green and his wife by quitclaim deed conveyed said section six to Robert Ellis, which deed was duly recorded. On July 11, 1861, Robert Ellis by quitclaim deed conveyed said section six to Frank Work, which deed was duly recorded July 24, 1861. On February 24, 1864, the auditor of White county, Indiana, executed a tax deed for said section six to said Frank Work, which deed recited that said land had been sold for taxes in the name of John Green, January 7, 1861, for the sum of \$80.51. On July 24, 1864, Frank Work and his wife executed a quitclaim deed for said section six to John Mott, which deed was duly recorded December 23, 1864.

“That said deed was made to John Mott at the request of Robert Ellis, and at the same time said Frank Work delivered to said Mott claims and debts against said Ellis, amounting to more than \$5,000, that had been paid by said Work to the creditors of said Ellis at his request. That to secure the repayment of the amounts so advanced by him for said Ellis, said Work had taken from said Ellis, on July 24, 1861, the conveyance for said section six as hereinbefore found, and had also purchased said land at tax sale and received the conveyance from the county auditor as hereinbefore stated. That at the request of said Ellis, said Mott paid to said Work all that Work had so advanced for Ellis, and took an assignment from Work of the claims against Ellis that Work had so paid, and Mott took Work’s

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place, taking, at the time he took such assignment, said deed from Work executed July 24, 1864, as security for the repayment of the amounts so paid by him to Work for Ellis. That on and prior to July 11, 1861, the date of the deed from Robert Ellis to Frank Work, said Ellis was indebted to said Work for borrowed money, and said deed was executed by said Ellis, he intending it as security for the same, but the said deed was executed without the knowledge of said Work; that on July 24, 1864, the date of the deed from Frank Work and wife to John Mott, the said Mott paid to the said Frank Work, the money the said Work had loaned to the said Ellis, and said Work, at the request of said Ellis, made before the time of said conveyance, and in consideration of the payment by the said Mott to said Work of the money that said Work had loaned to said Ellis, he, said Work, and his wife, joining, executed said deed for said section six and other lands."

On April 13, 1871, John Wright and wife executed a warranty deed to John Mott for said section six, which deed was duly recorded, July 5, 1872. Said John Mott died March 8, 1877, in the state of New York, leaving appellant, his widow, surviving and his children, Laura and Grace Mott, his only heirs at law. That his daughter, Laura, married Able Johnson and afterwards died in 1884, leaving as her only heirs, her said husband and two children, Grace Mott Johnson, who is still living, and the other died about four weeks after its mother. Grace Mott died testate February 5, 1863, never having married. The will of said Grace Mott was duly admitted to probate in the state of New York, and a certified copy thereof was proved and admitted to probate in the White Circuit Court, March 1897. Grace Mott, by her last will, gave appellant all of her real estate. Said real estate was never occupied by any one until within the last six years, when it was occupied by appellees, Fiske and Beem, who took possession thereof under a deed from parties other than appellant, and have made

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lasting and valuable improvements thereon to the value of \$300.

It is settled in this State that a deed absolute on its face may be shown to be only a mortgage. A court of equity will have regard to the real nature of the transaction, and, although a deed be absolute in form, if in fact it was received as security for the repayment of money, it will be treated as a mortgage, and evidence written or oral will be received to show the facts. *Hamilton v. Byram*, 122 Ind. 283, and cases cited; *Cox v. Radcliffe*, 105 Ind. 374, and cases cited; *Beatty v. Brummett*, 94 Ind. 76. In such case the grantee holds the title as mortgagee in equity.

It is insisted by appellant that the findings as to the deeds to Work and Mott being security for the indebtedness of Ellis, are mere conclusions unsupported by ultimate facts, and are insufficient; and the finding that the execution of the deed to Work was without his knowledge, shows that there could have been no binding defeasance at the time; that it should be treated merely as a mortgage. We do not think that the findings in regard to the deeds to Work and Mott, being security for the indebtedness of Ellis are mere conclusions, as insisted by appellant. If there were no findings as to any indebtedness of Ellis to said parties and concerning the nature of the transaction and dealings between them, but only a finding that the deeds were taken as security, or that they were executed as mortgages, a different question would be presented. In *Hamilton v. Byram*, 122 Ind. 283, the findings in regard to a deed being executed as a mortgage, were almost the same as in the case at bar, and the judgment was affirmed. It is true that it is found that Work had no knowledge of the execution of said deed at the time of its execution, but while the execution of a written instrument generally includes the delivery of the same, yet this term is not always used in that sense. It frequently is used to indicate that the instrument was signed, or signed and acknowledged. To determine the sense in

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which the term was used by the trial judge, said finding must be read in connection with the finding that "Work took said deed as security for said indebtedness," and when so read, the findings show that when said deed was signed and acknowledged by Ellis, that Work had no knowledge thereof, but that when delivered to him, he received the same as security for said indebtedness, and that he purchased said land at tax sale, and took a tax deed therefor for the same purpose. It appears, therefore, from the findings that when the deed was delivered to Work, that it was the intention of both the parties thereto that the same was security for the indebtedness of Ellis, the grantor, to Work, the grantee, that is, although a deed absolute on its face, it was in fact only a mortgage. It is evident, therefore, that said deed when executed, was in fact, a mortgage.

The findings show that Work made the deed to Mott at the request of Ellis, and that all the claims held by Work against Ellis were assigned to Mott, and that Mott paid Work the amount of the same, and that Work at the same time, at the request of Ellis, conveyed the real estate to Mott, who received the conveyance to secure the repayment of said indebtedness. It cannot be said that Mott was an innocent purchaser, because the facts do not show a purchase; on the contrary, it is evident that it was a purchase of the claims held by Work against Ellis, and the deed was made to Mott to secure the same.

It is contended by appellant that Ellis has abandoned the land, and has stood by and permitted Mott to mortgage the same, and that he has been guilty of laches, and cannot be heard in a court of equity. There is no finding that Ellis had abandoned his interest in said real estate, or that he has stood by and permitted Mott to mortgage the land as his own. The only mortgage executed by Mott was to Andrews, and that was for the benefit of Ellis. Appellant nor any one under whom she claims title has ever occupied said land, nor is it shown that they ever attempted to

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enforce any rights thereto under the deed from Work before the commencement of this action. Under such circumstances whenever any attempt is made to enforce any rights under said deed, mere lapse of time will not bar the right to assert and show that the same is a mortgage.

It is not claimed that the deed from Wright to Mott, made July 5, 1872, gave Mott any title to said real estate. Neither is it necessary to decide whether or not the deed from Green and wife to Robert Ellis conveyed any title in said real estate to said Ellis, for even if it did, yet, under the facts found, Mott's interest therein under his deed from Work, was that of a mortgagee.

As appellant only claims title to said real estate through John Mott, her husband, and as devisee, under the will, of her daughter Grace, who was an heir of said John Mott, she was not entitled to partition of said real estate, nor to any recovery in this action. Judgment affirmed.

BOARD OF COMMISSIONERS OF JACKSON COUNTY ET AL.
v. THE STATE EX REL. SHIELDS ET AL.

[No. 18,928. Filed December 18, 1900.]

LAW OF CASE.—*Counties.*—*Removal of County Seat.*—*Taxation.*—A decision of the Supreme Court in an appeal from a judgment requiring the board of commissioners to order an election under a special act for the relocation of a county seat, holding the provisions of the act for raising revenue valid, is not the law of a new and independent action brought to compel the commissioners to order another election under such act, and its validity as a precedent is subject to review on appeal in such subsequent action. *p. 607.*

TAXATION.—*Constitutional Law.*—*Counties.*—*Removal of County Seats.*—The provision of the act of 1895 (Acts 1895, p. 217) for the relocation of the county seat of Jackson county requiring the levy and collection of a special tax in the township in which the county seat should be located, to provide funds for erection of the buildings, is in conflict with the general law of the State pertaining to counties, and is in contravention of article 4, §2 of the Constitution which provides that the General Assembly shall not pass local or special laws "for the assessment and collection of taxes for State, county, or road purposes," and also violates article 10, §1 of the Constitution, requiring uniformity and equality of taxation. Overruling, in part, *Board, etc., v. State, ex rel.*, 147 Ind. 476. *pp. 605-610.*

155	604
161	624
161	625

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From the Monroe Circuit Court. *Reversed.*

B. H. Burrell, D. A. Kochenour, W. H. Endebrock, Frank Branaman, J. F. Applewhite, Ralph Applewhite, H. C. Duncan and I. C. Batman, for appellant.

O. H. Montgomery, J. H. Shea, C. E. Wood, J. B. Wilson, B. K. Elliott, W. F. Elliott and F. L. Littleton, for appellee.

BAKER, J.—In 1895 the legislature passed a special act for the relocation of the county seat of Jackson county under certain procedure therein provided. Acts 1895 p. 217. In conformity to the provisions of this act, a petition was filed with the board of commissioners, asking that an election be ordered to enable the voters to decide upon the question of relocation. The board refused to order an election. The petitioners began proceedings in mandamus. The circuit court, on final hearing, issued a peremptory writ. On appeal to this court, the judgment was affirmed. *Board v. State, ex rel.*, 147 Ind. 476. In obedience to the judgment, the board ordered an election. The voters decided against a relocation. A second petition was thereupon filed with the board, in which the proposed relocation was the same as that described in the first petition. The board refused to order a second election. This action was then begun in the Jackson Circuit Court to obtain a peremptory writ of mandamus against the board and the members thereof, commanding them to order a second election. The venue was changed to the Monroe Circuit Court. Demurrer to the complaint and alternative writ was overruled. Two paragraphs of affirmative answer were filed. The gist of the first was that the first election exhausted the privilege granted by the special act; of the second, that the board was not and could not lawfully be in regular session between the filing of the complaint and the return day to the alternative writ, and that the special act forbade them to order an election at a called session. Demurrers having been sus-

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tained to these answers, and the defendants having declined to plead further, final judgment was rendered. The errors assigned involve the sufficiency of the complaint and alternative writ, and of each paragraph of answer.

The principal question argued in reference to the sufficiency of the complaint is the constitutionality of the special act. The same points are presented that were considered in *Board v. State, ex rel.*, 147 Ind. 476, and decided against appellants. Among the objections to the act, then urged and now repeated, was one to the effect that sections seventeen, eighteen, nineteen and twenty-two violate section one, article ten, of our Constitution, which requires uniformity and equality in taxation, section twenty-two, article four, which forbids special or local acts in certain cases, and section twenty-one, article one, which provides that no man's property shall be taken by law without just compensation. Section seventeen of the act reads as follows: "For the purpose of providing funds for the erection of said buildings, it is hereby made the duty of the township trustee of the township in which said new county seat is to be relocated, and in which said new court-house and jail is to be built, to annually levy a special tax of one-half of one per cent. on each \$100 of taxable property of said township and incorporated towns and cities therein. Said tax shall be known as the court-house and jail tax, and shall be levied annually by said trustee, as other township taxes are levied, until such annual levies and collections shall have produced a sufficient revenue to pay for the construction and completion of said court-house and jail. No part of the taxes so collected shall be used for any purpose other than the purpose provided for in this act." Section eighteen provides for the issuance of the bonds of the township in anticipation of the receipts from the tax. Section nineteen authorizes the sale of these bonds. Section twenty-two requires that the charges, expenses and liabilities consequent upon the relocation of the county seat and the construction of the new county buildings

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shall not, in whole or in part, become a charge against the county, and that the county shall not assume any liability on that account, but that the whole expense shall be paid by the township.

In *Board v. State, ex rel.*, 147 Ind. 476, these provisions were held to be valid on the basis that it was within the legislative discretion to create a special taxing district out of the township, to decide that the special public improvement would result in special benefits to the persons or property within such special district, to decide that the special benefits to the district as a whole equaled the total cost of the improvement, and to require each \$100 of taxable property in the district to bear an equal part of the total cost irrespective of the amount of special benefits actually received.

That decision is not the law of this case, for this is a new and independent action; and its validity as a precedent is subject to review, for it is not a rule of property. The error was there committed of assuming that the contribution exacted by section seventeen from the taxpayers of the township was a "special assessment for a local improvement" and not a "general tax". This exaction has none of the characteristics of a special assessment for a local improvement. The statute does not pretend to make the special benefits conferred upon certain parcels of real estate by reason of being adjacent to or connected with the proposed improvement the measure of the exaction, nor to give the owners of such real estate notice and an opportunity to contest the amount of the assessment, as was found to be the case in *Adams v. City of Shelbyville*, 154 Ind. 467; and *City of Indianapolis v. Holt*, ante, 222. "One-half of one per cent. on each \$100 of the taxable property of said township and incorporated towns and cities therein" must be paid annually by each owner of taxables, real or personal. The tenant on the remotest farm in the township must pay the same *ad valorem* tax on his chattels that is paid by the owners of the lots surrounding the court-house grounds.

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In form, the tax is a general tax. It "shall be levied annually as other taxes are levied". In nature, the tax is a general tax. The purpose is exclusively a public purpose. But the exaction under section seventeen can not be upheld as a general tax for two reasons:

(1) The legislature, by a general law in reference to the business and duties of counties, enacted under the present Constitution and in force since June 17, 1852, required each county as a governmental subdivision of the State to erect and maintain a court-house and jail within the limits of the county. §§13, 16, 17, 1 R. S. 1852, §§5745, 5748, 5749 R. S. 1881 and Horner 1897, §§7830, 7833, 7834 Burns 1894. Conceding that the legislature might have made it the duty of the State to provide court-houses and jails throughout the State, or the duty of each township as a governmental subdivision to construct and keep in repair a court-house and jail within its limits, it is to be noted (1) that the legislature laid the duty upon each county; (2) that a right or duty of any township or any county as a governmental subdivision can not be created by a special law, and (3) that a tax for a State, county or township purpose can not be imposed or authorized under a special law (article 4, section 22, of the Constitution). Conceding that as a general rule the legislature may adopt any means it sees fit to achieve a lawful purpose, and conceding that the general purpose of the removal of a particular county seat may be accomplished under a special act, it does not follow that the legislature may effectuate that end by means which the Constitution forbids to be operative except under a general law.

(2) It may be laid down as a general proposition that, under a constitutional limitation like that embodied in article 10, section 1, of the Constitution of this State, requiring uniformity and equality of taxation, a tax for a State purpose must be uniform and equal throughout the State, a tax for a county purpose must be uniform and

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equal throughout the county, and a tax for a township purpose must be uniform and equal throughout the township. Cooley on Taxation (2nd ed.), 144; *Wasson v. Commissioners*, 49 Ohio St. 622, 32 N. E. 472, 17 L. R. A. 795; *Hubbard v. Fitzsimmons*, 57 Ohio St. 436, 49 N. E. 477; *Bright v. McCullough*, 27 Ind. 223, 230; *Loftin v. Citizens Nat. Bank*, 85 Ind. 341, 345, 346; *Mayor of Mobile v. Dargan*, 45 Ala. 310, 320; *Hutchinson v. Ozark Land Co.*, 57 Ark. 554, 557, 22 S. W. 173; *Prim v. Belleville*, 59 Ill. 142, 144; *Dyer v. Farmington Village*, 70 Me. 515, 522-524; *People v. Salem*, 20 Mich. 452, 474; *Sanborn v. Commissioners*, 9 Minn. 273, 278; *Murray v. Lehman*, 61 Miss. 283, 286; *Turner v. Althaus*, 6 Neb. 54; *State v. Collins*, 43 N. J. L. 562, 565; *Gilman v. City of Sheboygan*, 2 Black 510, 517, 17 L. ed. 305; *Pine Grove Tp. v. Talcott*, 19 Wall. 666, 675, 22 L. ed. 227. It is unnecessary to examine the facts of these cases and express any approval or disapproval of the application made of the general principle, for the cases are here cited only as supportive of the general rule above stated. It is also unnecessary to analyze the cases cited by appellees from other jurisdictions in which the legislatures had declared that taxes upon townships or cities for the construction of county buildings were levied for township or city purposes, or to distinguish or criticise the cases in this jurisdiction in which the legislature had declared that bonuses by counties to secure the location of State institutions and bonuses by townships to secure the location of railroads could be raised by taxes that were respectively for county and township purposes, for in this case it is found that there has been maintained on the statute books since 1852 a general law by which the legislature exercised its discretion by making the erection and maintenance of court-houses and jails the duty of the counties, and it is a maxim in constitutional law that "the legislature may suspend the operation of the general laws of the State, but when it does

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so the suspension must be general and can not be made for individual cases or for particular localities". Cooley's Const. Lim. (6th ed.) 482, and cases cited in note two. A special act requiring Marion county to construct and forever maintain the Capitol and other State buildings within the county, if the general laws or the Constitution of the State required them to be erected and kept in repair by the State, would be an infraction of the Constitution no grosser than that made by the sections in question in the present act.

If the requirement that the total cost be borne by the township were stricken out, it might be said, if it were not for section twenty-two, that the proceedings could be had to relocate the county seat and construct new buildings at the expense of the county, since the county is to own the new ground and buildings. But section twenty-two explicitly forbids this, and so the act is left without any possible means provided for its fulfilment.

As the complaint is bad, it is unnecessary to examine the sufficiency of the answers.

Judgment reversed, with directions to sustain the demurrer to the complaint.

Dowling, C. J., and Monks J., concur in the reversal.

Jordan, J., dissents.

CONCURRING OPINION.

Dowling, C. J., and Monks, J., concur in the reversal only upon the ground that section seventeen of the act under consideration is invalid because in violation of clause twelve, section twenty-two, article four of the Constitution. It is conceded that said act is local, and it was so decided in *Board, etc., v. State*, 147 Ind. 476.

Said section seventeen provides for raising the money to build the new court-house and jail, by annually levying and collecting a special tax on all taxable property in the township to which the county seat is removed. This is clearly in

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violation of said clause of the Constitution, *supra*, which provides that the General Assembly shall not pass local or special laws, "For the assessment and collection of taxes for State, county, township, or road purposes." It is true that the General Assembly has the power to pass local or special laws for the removal of county seats. *Mode v. Beasley*, 143 Ind. 306. But this does not authorize the enactment of a provision in such local or special laws that violates any part of the Constitution.

And Dowling, C. J., concurs in the reversal for the additional reason that the erection of a court-house and jail is in no sense a township purpose.

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[No. 19,869. Filed December 18, 1900.]

GAME.—*Constitutional Law.*—Section 2209 Burns 1894, making it unlawful for any person to have in his possession any quail during the close season, as therein provided, is not violative of the fourteenth amendment to the United States Constitution which provides that no state shall make or enforce any law which shall deprive any person of property without due process of law, nor of article 1, §21 of the State Constitution which provides that no man's property shall be taken by law without just compensation. pp. 611-614.

SAME.—*Possession of Game Taken in Open Season.*—Under the provision of §2209 Burns 1894, one having in his possession quail during the close season, as therein provided, is liable to punishment therefor, although the quail came into his possession during the open season. pp. 614-617.

From the Marion Criminal Court. *Affirmed.*

R. W. McBride and *C. S. Denny*, for appellant.

W. L. Taylor, Attorney-General, and *A. E. Dickey*, for State.

HADLEY, J.—Appellant was convicted before a justice of the peace, under §2209 Burns 1894, §2107 Horner 1897, which reads as follows: "Whoever shoots or destroys * * * or has in his possession any quails * * *

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during the period from the first day of January of any year to the tenth day of November of the same year, * * * shall be fined," etc., upon an affidavit charging him with having in his possession on the 5th day of February, 1900, one quail. Upon appeal to the criminal court the appellant, having pleaded not guilty, was again convicted and fined upon the following evidence: "Said defendant admitted in open court that on the 5th day of February, 1900, he did have in his possession, at Marion county, in the State of Indiana, one quail, as charged in the affidavit filed herein, but that said quail had come to his possession on the 30th day of December, 1899, at which time he received it and placed it in his refrigerator where it had remained from said date continuously until said 5th day of February, 1900. And this was all the evidence given in the cause."

Under the assignment of errors the appellant affirms two propositions: (1) The unconstitutionality of the statute, and (2) the guiltlessness of the act proved within the true meaning of the statute. The appellant contends that if the statute is to receive a literal construction, and make guilty one who rightfully receives possession of quail in the permissive season, and becomes vested with the right of property in a wholesome article of food, to compel a disposition of the property by a fixed date, without reference to the use it can be put to, is practical confiscation and violative of the fourteenth amendment of the federal Constitution, which provides that "no state shall make or enforce any law which shall * * * deprive any person of * * * property without due process of law", and of §21, article 1., of the State Constitution, which provides that "no man's property shall be taken by law without just compensation."

It is important to note that American quails are game birds and as such belong to the State in its sovereign capacity as the trustee of the citizens in common. Such game is a valuable and wholesome article of food diffused and accessible to all, and its preservation a matter of general

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interest to the people. The primary object of government is mutual safety and benefit, and to promote these ends it has long been held that the State possesses such police power as enables it to employ drastic measures to protect the public health, morals, safety, and such other concerns as affect the happiness and general welfare of the citizens. To deny such power is to deprive the government of one of its essential forces. Nor is it apparent how there can exist any real ground of complaint. The individual has no natural right to take game, or to acquire property in it, and all the right he possesses or can possess in this respect is granted him by the State. The power to grant embodies the power to impose conditions; and in granting the privilege of reducing quail to possession, with proprietary right, it is competent for the State to prescribe such conditions of enjoyment as are deemed reasonable and necessary to protect the common interest. The citizen, when he accepts the State's grant, accepts it impressed with all the restrictions and limitations laid upon it, and when he acquires property under such license he does so with full notice of his qualified right, and so, if he loses that which he has taken or held possession of upon forbidden terms, he has lost nothing that belonged to him, and there has been no taking of property without due process of law or without just compensation.

Quails not only supply a delicate and nutritious food highly valued by the people, but from their wild and agile nature offer alluring sport to hunters, which if unrestrained would probably lead to their ultimate extinction; hence, any measure which in the judgment of the legislature is reasonably calculated to avoid such result and preserve these food birds for future benefit, even to the extent of restricting the use of, or right of possession in the birds after they have been taken, or killed, must be held to be a legitimate exercise of legislative power. *State v. Rodman*, 58 Minn. 393, 59 N. W. 1098; *Phelps v. Racey*, 60 N. Y. 10; *Haggerty v. St. Louis, etc., Co.*, 143 Mo. 238, 44 S. W. 1114, 40 L. R. A. 151; *State v. Judy*, 7 Mo. App. 524.

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Other decisions which uphold the validity of such legislation but which turn upon the defense that the game was lawfully acquired outside the state are as follows: *Magner v. People*, 97 Ill. 320; *American Ex. Co. v. People*, 133 Ill. 649, 24 N. E. 758, 9 L. R. A. 138; *Ex Parte Maier*, 103 Cal. 476, 37 Pac. 402; *Roth v. State*, 51 Ohio St. 209, 37 N. E. 259; *Stevens v. State*, 89 Md. 669, 43 Atl. 929; *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. ed. 793.

Decisions of the State sustaining legislation for the protection and preservation of fish rest upon the same principle. See *Gentile v. State*, 29 Ind. 409; *State v. Lewis*, 134 Ind. 250, 20 L. R. A. 52.

Upon the second point it is contended that if the law is constitutional, the words "Whoever has in his possession any quails" should not be construed to embrace quails rightfully acquired in the open season, and continuously kept by the owner in his possession to a period within the close season. We must assume that the lawmakers rightfully apprehended the meaning of the words employed by them in stating their intention, and in the absence of some fact relating to the subject-matter legislated upon, or other provisions of the act inconsistent with the ordinary meaning of the language used, we must conclusively presume the meaning to be that which is usually conveyed by the words. To arbitrarily give an unusual meaning to the word would be to change the law, and this we have no power to do. It has long been the policy of the State to preserve its fish and food birds from destruction or immoderate diminution. In 1857 there was passed "An act to provide for the protection of wild game defining the time in which the same may be taken and killed." Acts 1857, p. 39. In this first act it was provided by section three that it should be unlawful to shoot, trap or net quails and pheasants between February 1st and November 1st of each year, and by section six it was made unlawful to have in possession any quails

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or pheasants killed or taken within the prohibited season. It will be perceived that at the beginning of legislation upon this subject the legislature limited the wrongful possession to birds taken or killed within the forbidden season. This act was amended by contracting the permissive season in 1861 and again in 1863. In 1867 the first act, "To provide for the protection of fish, defining the time in which they may be trapped, netted or seined", was enacted making a violation of the provisions of the act a misdemeanor. Acts 1867, p. 128. At the same session another act was passed entitled "An act to provide for the protection of wild game". By this act it was made unlawful to shoot or trap quails or pheasants between February 1st and October 1st, and to net quails at any time, and unlawful to transport quails killed or taken in violation of the act. In 1871 another act "To provide for the protection of fish" was passed. Acts 1871, p. 24. And in 1877 still another act "To provide for the protection of wild game", by which act the netting and trapping of quails is absolutely prohibited at all times. Acts 1877, p. 69. Again in 1879 another step was taken by the legislature "To provide for the protection of wild game," section nine of which act reads as follows: "It shall be unlawful to sell, keep or expose for sale, *or have possession of any quail* or pheasant between the fifth day of January and the first day of November in any year; * * *. Any person or persons violating the provisions of this section shall be fined '\$1 for each and every quail, * * * so unlawfully kept, sold, exposed to sale, or possessed." Acts 1879, p. 242.

Other laws relating to the same subject were passed in 1881. See Acts 1881, p. 218, §§2106, 2112-2115, R. S. 1881, inclusive, prohibiting the destruction of quails, the selling *or possession of quails* in a particular season, the selling or possession of quails at all times that have not been killed by shooting, the transportation of quails within the State killed or taken in violation of law, and their transportation out of the State at any time.

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In 1893 the method of protection was again emphasized by the act set out at the beginning of this opinion and under which this prosecution is had.

In 1897 there was passed "An act to prevent the destruction of quail" which makes it unlawful to kill any quail for the purpose of sale, or to sell, barter or offer to sell any quail caught or killed in the State.

The enacting clauses of the foregoing laws clearly disclose the general purpose of the State, and the progress made in restrictive measures affirms the inadequateness, in legislative opinion, of previous provisions to accomplish the purpose intended. At the beginning, more than forty years ago, it was made unlawful to shoot, trap, or net quails between February 1st and November 1st, and to have quails in possession that had been taken or killed in the close season. Next it was made unlawful to shoot or trap them between February 1st and October 1st and to net them at any time, and, as the next step, trapping was prohibited altogether. For twenty years it had been a good defense to a charge of wrongful possession to prove that the birds had been taken or killed in the open season, but in 1879 it was made unlawful, not only to sell, but to offer for sale, or *have in possession*, within the close season, any quail, without reference to when killed or acquired. As a further step, in 1881 the right to sell or have quails in possession in the open season was confined to such birds only as had been killed by shooting, and in 1897 the right to sell at any time was wholly denied.

The constantly increasing stringency in repressive measures illustrates the difficulty encountered by the legislature in framing a law that was effective for the protection of quails, and the provision under review, making the act of possession within the close season, *ipso facto*, a crime, after its adoption in 1879 and its reaffirmance three times in the same words, must be accepted as evidencing legislative opinion that such provision is an essential means of prevent-

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ing an evasion of the law. As was well said in *State v. Rodman*, 58 Minn. 393: "What this provision aims at is not the mere fact of possession of game lawfully obtained, but to prevent its being unlawfully taken or killed. If it were permitted to have possession during the closed season without limitation of game taken or killed during the open season, it would inevitably result in frequent violations of the law, without the least probability of a discovery. Game is usually found in secluded places, away from habitations of men, with no one to witness the killing but the hunter himself. The game would have no earmarks to show whether it was taken or killed in the open or close season, and hence conviction under this statute would ordinarily be impossible, and the law would become practically a dead letter. In these days of cold storage warehouses, the mere lapse of time after the expiration of the open season would furnish little aid in an effort to prove that the game had been taken or killed out of season."

In such misdemeanors the motive is of no consequence. It is the act, and the act only, that constitutes the offense. *State v. Engle*, (Ind. Sup.) 58 N. E. 698. The simple words are: "Whoever has in his possession any quail" is guilty. The language is so clear and unambiguous as to leave no room for construction. How or when the possession was acquired is not made material by the legislature, and we have no power to make it so. See cases above cited.

Judgment affirmed. Jordan, J., dissents.

DISSENTING OPINION.

JORDAN, J.—I can not concur in the majority opinion in this case so far as it in effect holds that the possession of the quail by the appellant, under the facts, was a penal offense in the meaning and spirit of the statute in controversy. The admitted facts conclusively show that the quail in question had come into the possession of the accused on the 30th day of December, 1899, the same being a day

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within the open season when it was lawful to kill or take quails and reduce the same to possession. On that date, it seems, it was placed by appellant in his refrigerator and there remained until the 5th day of the following February. The statute, as enacted, and whereby the legislature has declared the period which shall constitute the close season, in respect to killing or taking of such game, reads as follows: "Whoever shoots or destroys, or pursues for the purpose of shooting or destroying, or has in his possession any quails or pheasants during the period from the first day of January of any year to the tenth day of November of the same year, or shoots or kills any wild turkey between the first day of February and the first day of November of any year, shall be fined in the sum of \$2 for each quail, wild turkey or pheasant so killed, and the sum of \$1 for each quail or pheasant so pursued, or had in his possession." §2209 Burns 1894.

This act, under its provisions, neither assumes nor professes to deal with or to have any reference or application to quails which were lawfully taken and reduced to possession by the taker during the open season. From my view of the law it would certainly appear to be a very harsh and unreasonable interpretation of this statute to hold that the legislature thereby intended to make the possession of quail, when such possession was lawful at the taking, a criminal offense by the mere lapse of time, or, in other words, that a continuation of such possession over into the close season should constitute a crime. In the absence of an express declaration to that effect, can it be asserted that the legislature intended, by this statute, not only to make the possession of quails killed or taken during the forbidden time an unlawful act, but, under its provisions, it was intended to go further, and trace, if necessary to constitute the offense, the possession of such game back into the open season, and forbid, under a penalty, a continuation of such possession over into the close season? Before a judgment of a court in

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a criminal cause which would lead to such an unjust and unreasonable result is rendered, the language of the statute involved should be clear and mandatory and free from all reasonable doubt in respect to its meaning. Before the statute in question is enforced against the accused, under the facts in the case, the court ought to be fully satisfied that the act which the statute imputes to him is made unlawful, not only by the letter, but that it also falls within the spirit and intent of the law. For the principle is elementary that a thing within the intent of the statute is as much within it as if it were within the letter, and a matter, although within the letter of the law, is not within its provisions if contrary to the intent and spirit of the act. *Conn v. Board, etc.*, 151 Ind. 517.

It is a well settled canon in respect to the construction of laws that where the language of the legislature is fairly susceptible of two meanings, the one which excludes or prevents consequences which are mischievous and unjust will be preferred and adopted by the court. In fact, statutes are not always, nor should they be, literally construed. *Donnell v. State*, 2 Ind. 658; *Hooper v. State*, 56 Ind. 153. The rule is well settled that in the construction or interpretation of a criminal statute all reasonable doubt which may arise in respect to its meaning must be resolved in favor of the person accused thereunder.

I recognize the rule of the law which affirms that the title or right to all animals, birds, fowls, or fish, *ferae naturae* is held by the State, the sovereign power, in trust for the benefit of all the people of the State, and that the latter, by its legislature, may impose such conditions, regulations, or restrictions as may be deemed proper or necessary in respect to the taking or having in possession any of such animals, birds, fowls, or fish, and that he who acquires the ownership or possession, under such imposed conditions, regulations, or restrictions, will be held to be subject thereto, and his title or right of possession will be controlled thereby.

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But that is not the question involved in this appeal. It may be conceded that the State has the power to make the possession of quails in the close season unlawful, although such possession was acquired in the open season, and continued over into the close period. But this concession does not solve the question involved in this appeal, which is: Can it in reason be asserted, under the rule governing the interpretation of statutes, that the legislature, under the statute in dispute, intended, under the circumstances, to make such possession unlawful? That this question must be answered in the negative to me appears to be quite evident and beyond successful controversy. Had the legislature intended by this law to make it unlawful for a person to have in his possession quails taken during the open season, considering the importance of the question, it may be assumed that the legislative will to this effect would have been expressed or declared in clear and positive language.

A statute of the state of Maine prohibited, under penalty, the hunting or killing of deer between the 1st of January and the 1st of October. By this act it was also made an offense for any person to carry or transport the carcass or hide of any deer during the prescribed close period. One Young was prosecuted under the statute for transporting on February 17, 1883, the carcasses of two deer. It was shown by the evidence that he killed and came into the possession of one of the animals in the state of Maine on the 30th day of the previous December, and of the other animal on the 31st day of the same month; that the carcasses of the deer were taken by him from the place where he had killed them in that state to his own home, and there remained until February 17th following, and then transported by him to the railroad station to be shipped by rail to Boston, Massachusetts, for the purpose of sale. The case was appealed to the supreme court of Maine. See *Allen v. Young*, 76 Me. 80. In deciding the question as therein involved, which was identical with the one in issue in the

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case at bar, the court said: "The question is whether, if deer are killed during the time when it is lawful to do so, it is a crime to carry or transport the hides or carcasses from place to place in this state during the time when it is unlawful to kill them. We think it is not. True, the transportation at such a time seems to be within the letter of the law; but we think such could not have been the intention of the legislature. We can see no possible motive for making such transportation a crime. We can readily see that it would be in furtherance of the purposes of the act to make such transportation *prima facie* evidence of guilt, and thus throw the burden of proof upon the party to show his innocence, as is done in section five with respect to possession; but we fail to see any motive for making the mere transportation of the hide or carcass of a deer from one place to another a crime when the deer has been lawfully killed and is lawfully in the possession of the one who transports it. Certainly one may reasonably doubt whether such could have been the intention of the legislature; and the act being a penal one, a reasonable doubt is sufficient to make it the duty of the court to adopt the more lenient interpretation, and construe the term, 'such animal' as meaning an animal unlawfully killed, as was done in construing a similar statute in *Com. v. Hall*, 128 Mass. 410."

In the case of the *State v. McGuire*, 24 Ore. 366, 33 Pac. 666, 21 L. R. A. 478, the defendant was prosecuted, under a statute of that state, for having in his possession certain fish during the period when the law made it unlawful for any person to receive or have any such fish in his possession. The defendant offered to prove, as a defense to the prosecution, that the fish in controversy had been lawfully caught in the open season and belonged to fish dealers in the city of Portland and had been by such dealers placed in his possession only for the purpose of cold storage. It was held in that case that by reason of the fact that the fish were caught in the open season, the possession thereof thereafter

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during the prohibited period would not render the possession unlawful within the intent of the statute. The cases *pro* and *con* in respect to the law upon the question involved are fully collected and reviewed by the court in that appeal. The trial court, it seems, in construing the statute involved in that prosecution, held that the possession of the fish by the defendant during the close season constituted a crime, regardless of the fact as to when or where they were caught or taken. The supreme court, in considering the construction placed upon the statute by the lower court said: "The effect of this construction is to declare that, in order to protect the salmon in this state, it was the intention of the statute to punish the offering for sale, or the having in possession, of salmon of the varieties specified, during the prohibited seasons, no matter whether they were lawfully caught within or without the state; in a word, that it was the intention of the legislature to punish the mere possession of salmon which had been lawfully caught or taken. It ought to require plain, unambiguous, and mandatory language to justify any court in declaring fish or game lawfully caught or taken to be the subject of an offense, by the simple possession of it. A construction leading to such injustice ought to be avoided if it can be reasonably done. Salmon fish is an article of food, and the law interdicting the catching of them at certain seasons is not because they are unfit for use, or unwholesome, but to protect and preserve such fish in this state."

In the case of *People v. O'Neil*, 71 Mich. 325, 39 N. W. 1, the defendant was accused of having in his possession, in violation of a statute of the state of Michigan, a number of quail in the month of April, 1888, this latter month, under the law, being within the close season in that state. The evidence established that he had purchased these birds in the state of Missouri and had received them into his possession in the month of December, 1887, this latter month being within the open season in the state of Michigan. The su-

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preme court in that appeal held that under the facts the possession was not unlawful within the spirit or meaning of the criminal statute involved. Champlin, J., speaking as the organ of the court, in respect to the interpretation of the law, said: "A construction of a statute which leads to such harsh consequences, and punishes with severe penalties acts which are confessedly innocent in themselves, must not only be unambiguous, but mandatory; and the act done must be not only within the letter, but within the spirit, of the law to gain my assent to its enforcement. Our statute requires no such strict or harsh construction. The articles interdicted are articles of food, and the interdiction is not because such food is unwholesome, and therefore detrimental to the public health, but the whole end and object of the legislation is to protect and preserve game in the state of Michigan." That eminent and learned jurist, Judge Campbell, in concurring in the opinion of his associates, said: "I do so for the further additional reason that I do not think it would be competent for our legislature to punish the possession of game which was lawfully captured or killed. Having become lawful private property, it can not be destroyed or confiscated, unless it becomes unfit for use, any more than other property can be destroyed. I do not think the cases to the contrary are reasonable or sound."

Commonwealth v. Wilkinson, 139 Pa. St. 298, 304, 21 Atl. 14; *James v. Wood*, 82 Me. 173, 19 Atl. 160, 8 L. R. A. 448; *Commonwealth v. Hall*, 128 Mass. 410, also sustain the doctrine asserted and adhered to, in the cases from which I have quoted. It can not be said that there is any real merit in one of the reasons given for the construction placed upon the statute by the majority opinion, which reason is to the effect that such a construction is necessary in order to prevent an evasion of the law, or, in other words, to enable the State more successfully to secure convictions thereunder. That is a question more properly for the consideration of the legislature.

If it had been intended by the lawmaking power to make the mere possession of quail during the prohibited season a criminal offense, without any regard to where, when, or how lawfully such game had been killed or taken, surely language could and would have been employed clearly to express such intention.

Under the holding in the prevailing opinion, the hunter who kills any quail on December 31st, the end of the open season, intending to eat them at his New Year's dinner, will discover that he is in a position of peril. He will be compelled either to eat the birds on the day he killed them, cremate them, or in some other manner destroy them, or, at least, he must in some way rid himself of their possession ere the clock strikes the hour of midnight, otherwise if he continues the possession of the birds over until the beginning of the next day he will be a violator of the law and liable to be subjected to its penalty.

In many of the cases cited in the majority opinion, the legislature appears, in the particular statute, by some provision to have emphasized its intention to make the law apply to and include game, without regard to the question as to when, where, or how the same had been killed, taken, or received.

Without further commenting upon the question, I am convinced that the conviction of the appellant in the trial court, under the facts, was wrong, and that the judgment ought to be reversed.

CLEMENTS ET AL. v. DAVIS, SHERIFF, ET AL.

[No. 18,823. Filed June 28, 1900. Rehearing denied Dec. 18, 1900.]

APPEAL AND ERROR.—*Parties.*—*Husband and Wife.*—Where in a suit by a wife to recover one-third of the proceeds of the sale of land owned by her husband, sold under a decree of foreclosure, the husband filed a cross-complaint disclaiming any interest, and joined with her in an appeal from a judgment on demurrer to the complaint, it was not necessary to join him as an appellee, no judgment being rendered in his favor against her. *p. 626.*

155	624
155	691
156	570
156	575
155	624
168	127
168	137
155	624
171	332

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PLEADING.—Foreclosure of Mortgages.—Judgment Creditors.—Husband and Wife.—Inchoate Interest of Wife.—Where in an action to foreclose a mortgage the only averment as to the mortgagor's wife was that she joined in the execution of the mortgage, and the answer of judgment creditors, who were made defendants, admitted the averments of the complaint, and asked that their interests be protected, and that any surplus of the proceeds of the sale of the mortgaged premises be applied on their judgment, no issue was thereby raised which required the wife to assert her inchoate interest in the real estate or in the proceeds of its sale. pp. 626-634.

JUDGMENTS.—Foreclosure of Mortgages.—Husband and Wife.—General Judgment Creditors of Husband.—Inchoate Interest of Wife.—Judicial Sales.—In a suit to foreclose a mortgage executed by husband and wife on the lands of the husband, to which suit general creditors of the husband are made defendants, and to which the wife is a party, it is not necessary that the wife should set up her inchoate right to the one-third of the lands mortgaged, or the proceeds of their sale, as against the judgment creditors, and she will not be concluded by a judgment directing the sale of the land, and the application of the proceeds, after the payment of the mortgage debt, to the discharge of the general judgments against her husband, where her interest in the land was not specifically put in issue. pp. 626-634.

From the Montgomery Circuit Court. *Reversed.*

M. M. Bachelder, for appellants.

H. H. Ristine and *T. H. Ristine*, for appellees.

DOWLING, J.—In this suit the appellant, Dora Clements, seeks to recover from the appellee, Charles E. Davis, as sheriff of Montgomery county, one-third of the proceeds of the sale of a lot of land owned by Robert Clements, the husband of the said Dora, sold by said sheriff under a decree of foreclosure, and to enjoin the said sheriff from paying the sum so claimed by the said appellant to certain judgment creditors of her husband, the mortgage debt, with interest and costs, having been fully paid, and an amount sufficient to pay said one-third remaining in the hands of said sheriff.

This is a second appeal. *Davis v. Clements*, 148 Ind. 605. When here before the complaint was held insufficient,

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and the judgment of the Montgomery Circuit Court, upon a demurrer thereto, was reversed. The complaint was amended, and new parties were added. The appellant, Robert Clements, filed a cross-complaint. The defendants below demurred separately to the complaint as amended, and to the cross-complaint. These demurrers were sustained, and, the appellants failing and refusing to plead further, judgments were rendered against them respectively. They appeal, and the errors assigned are the rulings of the court upon the demurrers. Objection is made that there is a defect of parties in the assignment of errors, for the reason that Robert Clements, the husband of Dora Clements, is not joined as an appellee. He disclaimed all interest in the moneys demanded by his wife in her complaint, and there was no judgment in his favor against her. He had, therefore, no interest in the controversy. He unites with her as an appellant, as he is authorized to do, and, in our opinion, it was not necessary to join him as an appellee. *Hogan v. Robinson*, 94 Ind. 138; *Case v. Case*, 137 Ind. 526; *Stewart v. Babbs*, 120 Ind. 568; *Magel v. Milligan*, 150 Ind. 582.

The material facts alleged in the complaint as amended were as follows: The Ladoga Building Loan Fund and Savings Association brought suit in the Montgomery Circuit Court to foreclose a mortgage executed by the said Robert Clements and Dora Clements, his wife, on a lot of land owned by Robert Clements, the husband, situated in the city of Ladoga, in said Montgomery county. The mortgagors, together with Daniel J. Davis and Thomas Rankin, who held a judgment against Robert Clements, were made defendants. Robert Clements and wife were personally served, but did not appear to the action, and judgment was taken against them by default. Davis and Rankin appeared and filed their joint answer to the complaint. Judgment was rendered in favor of the Ladoga, etc., association, for the foreclosure of the mortgage, and the sale of the mort-

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gaged premises. The decree directed the application of the amount realized from the sale of the property, (1) to the payment of the costs of the suit; (2) to the payment of the mortgage debt and interest, and (3) to the payment of the judgment in favor of Davis and Rankin. An order of sale, in pursuance of the said decree, was issued to the appellee, Charles E. Davis, the sheriff of said Montgomery county, and by virtue thereof he advertised and sold the real estate described in the decree for the sum of \$1,200. Out of this amount the sheriff paid the costs of the suit and the claim of the Ladoga, etc., Association, with interest, and threatened to apply the residue in his hands, amounting to upwards of \$400, to the said judgment of Davis and Rankin, agreeably to the terms of the judgment of foreclosure. The appellant Dora Clements was the wife of the said Robert Clements at and before the time when said judgment in favor of Davis and Rankin was rendered, and ever since has remained his wife. The judgment of the said Davis and Rankin, and the lien thereof, were general, and not specific. It was alleged that after the payment of the mortgage debt, interest, and costs, the said Dora Clements as such wife was entitled to have paid to her an amount equal to the one-third of the sum the said real estate brought, before the payment of the claim of the said judgment creditors, Davis and Rankin. It was also alleged that the sheriff, Charles E. Davis, would, unless restrained by the order of the court, pay the whole of the balance of the proceeds of the sale of said real estate in his hands to the said judgment creditors, Davis and Rankin, as directed by the decree. Prayer for a temporary restraining order, and for judgment for \$400, etc. Copies of the complaint in the foreclosure suit referred to, the answer of the judgment creditors, Davis and Rankin, thereto, and of the judgment or decree, were made exhibits, and were filed with the complaint.

The only allegation of the complaint, in the foreclosure suit, concerning the judgment of Davis and Rankin, as

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shown by the copy thereof filed in this action, was this: "That the defendants David J. Davis and Thomas Rankin, hold a judgment against one James F. Luther, and the defendant Robert Clements, jointly, as appears of record in the clerk's office of Montgomery county, Indiana, in the sum of \$921, and costs taxed at ——— dollars, taken on the 27th day of April, 1895, which plaintiff claims is subsequent to this mortgage."

The answer filed by the said judgment creditors, Davis and Rankin, omitting its title, was in these words: "The defendants David J. Davis and Thomas Rankin, for separate joint answers to the complaint herein, say, that on the 27th day of April, 1895, they recovered a judgment against the defendant Robert Clements, which said judgment is a lien upon the real estate in the complaint and mortgage mentioned, and they ask that in the judgment and decree rendered in this cause that their interest be protected, and that, if said mortgaged premises sell for an amount in excess of said mortgage debt, that the excess be paid to these defendants on their said judgment lien."

The court rendered a judgment for the sale of the mortgaged property, and directed that the proceeds of such sale be applied as follows: "(1) To the payment of all costs accrued, and to accrue, in this cause; (2) to the payment of the amount due the plaintiff as found in this judgment, with interest thereon as aforesaid; (3) to the payment of the amount due the defendants David J. Davis and Thomas Rankin on their judgment aforesaid; the overplus, if any, remaining after the payment of the foregoing judgments, interest, and costs, to be paid by the sheriff to the clerk of this court for the use of the party, or parties, lawfully authorized to receive the same," etc.

The question for decision is whether, under the allegations of the complaint, the appellant Dora Clements, as the wife of the owner of the real estate sold, is entitled to one-third of the proceeds of the sale of said lot, the residue of

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such proceeds having been more than sufficient to discharge the mortgage debt, interest, and costs, and leaving in the hands of the sheriff a sum exceeding the one-third of the amount for which said real estate sold. The appellant Dora Clements claims the said one-third of such proceeds under the provisions of §2669 Burns 1894, which is as follows: "In all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become absolute and vest in the wife in the same manner and to the same extent as such inchoate interest of a married woman now becomes absolute upon the death of the husband, whenever, by virtue of said sale, the legal title of the husband in and to such real property shall become absolute and vested in the purchaser thereof, his heirs or assigns, subject to the provisions of this act, and not otherwise. When such inchoate right shall become vested under the provisions of this act, such wife shall have the right to the immediate possession thereof; and may have partition upon agreement with the purchaser, his heirs or assigns, or upon demand, without the payment of rent, have the same set off to her."

The appellees Davis and Rankin contend that they are entitled to the funds in the hands of the sheriff by virtue of the decree in the foreclosure suit directing the payment of their judgment out of the proceeds of the sale of the real estate next after the discharge of the mortgage debt of the Ladoga, etc., Association. The appellant Dora Clements insists that this judgment is void as against her for the reason that she had no notice of any claim of the said Davis and Rankin against her inchoate interest, and that neither the complaint nor any cross-complaint sought to subject her inchoate interest in the real estate to the payment of the judgment of these creditors of her husband. To this the appellees reply that the court had jurisdiction

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of the subject-matter of the action of the parties to the suit, and that its judgment establishing the priorities of the defendants in that case among themselves, and directing the distribution of the fund is binding upon all the parties, and is not open to collateral attack.

If Mrs. Clements had appeared to the foreclosure suit, and had properly set up her claim to the one-third of the proceeds of the sale of the mortgaged premises, after the payment of the mortgage debt, interest, and costs, it is clear that under the provisions of §2669 of the statute, *supra*, such claim must have prevailed. The appellees Davis and Rankin had no right to subject Mrs. Clements' inchoate interest in her husband's real estate to the payment of their claim. Was there anything in any of the pleadings which required Mrs. Clements to appear and assert her claim against these judgment creditors of her husband, who had only a general lien upon his real estate? Upon her failure to appear, had the court jurisdiction to render a judgment barring her claim to the estate given her by the statute? Was the judgment rendered of such a character as to prevent her from establishing her claim in the present suit?

As the appellant Dora Clements was a party defendant to the foreclosure suit, and the complaint therein averred that her codefendants, Davis and Rankin, held a judgment against Robert Clements for \$921 and costs, rendered April 27, 1895, and subsequent to the execution of the mortgage sued on, a new summons or a voluntary appearance was not required to bring her before the court for the purposes of a cross-complaint by her codefendants who held the judgment. In other words, matter was apparent on the face of the complaint which would have authorized the filing of a cross-complaint against her by her codefendants, Davis and Rankin, and relief thereon, without new process, or a voluntary appearance. *Fletcher v. Holmes*, 25 Ind. 458; *Pattison v. Vaughan*, 40 Ind. 253; *Lewis v. Bortsfeld*, 75 Ind. 390;

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Swift v. Brumfield, 76 Ind. 472; *Bevier v. Kahn*, 111 Ind. 200.

It may be stated as a general rule, subject, however, to some restrictions, that one defendant can have no affirmative relief against a codefendant in a foreclosure suit, without a cross-complaint setting forth the particulars of his claim, and tendering an issue. All the decisions in this State upholding the jurisdiction of the court to settle conflicting claims of title and questions of priority of lien or interest proceed upon the ground that proper issues have been tendered. Where there is a default, the judgment is held to be conclusive only as to such matters as are properly averred or charged in the pleadings, and which might have been litigated under them, although some authorities announce a less rigid rule. 5 Ency. Pl. & Pr., p. 638.

In a suit to foreclose a mortgage, when a party is made a defendant to answer generally as to any interest he may have in the mortgaged premises, a default may be taken as an admission that he has no title to, or interest in, the property adverse to the claim of the plaintiff under the mortgage; but such default does not operate as an admission of the claims of codefendants which are not exhibited either in the complaint or in a cross-complaint. *Masters v. Templeton*, 92 Ind. 447; *Barton v. Anderson*, 104 Ind. 578; *Craighead v. Dalton*, 105 Ind. 72; *Adair v. Mergentheim*, 114 Ind. 303; *Bundy v. Cunningham*, 107 Ind. 360; *O'Brien v. Moffitt*, 133 Ind. 660, 36 Am. St. 566; *Ulrich v. Drischell*, 88 Ind. 354.

In this case, the only averment in regard to the appellant Dora Clements was that she joined her husband in the execution of the mortgage to the Ladoga, etc., Association.

The answer filed by the appellees Davis and Rankin was nothing more than an admission of the allegations of the complaint, and a prayer that their interests be protected, and that any surplus of the proceeds of the sale of the mortgaged premises, after the payment of the mortgage debt and

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costs, be applied on their judgment. This answer was addressed to the complaint alone; the appellant Dora Clements was not named in it; no fact is stated which it was necessary for her either to deny, or to confess and avoid; no right was asserted to subject her inchoate interest in her husband's real estate to the payment of the judgment of these creditors. Neither did these creditors, Davis and Rankin, file any cross-complaint. Under these circumstances, it cannot be said that any issue was tendered to Mrs. Clements as to her interest in the real estate, or in the proceeds of its sale.

But, even if the answer to the complaint had disclosed a claim by her codefendants to the fund to arise from the sale of the mortgaged premises, adverse to her interest in the same, a judgment settling the issue so made in favor of the defendants, Davis and Rankin, would not have determined the question between them and their codefendant, Dora Clements. *Jones v. Vert*, 121 Ind. 140, 16 Am. St. 379; *Leaman v. Sample*, 91 Ind. 236; *Gipson v. Ogden*, 100 Ind. 20; *Finley v. Cathcart*, 149 Ind. 470.

The nature of the interest of the appellant Dora Clements in the mortgaged premises was not such that a failure to assert it against judgment creditors, who held only a general lien by virtue of their judgment against the real estate described in the plaintiff's mortgage, would result in its loss.

That interest was not a mere encumbrance or lien, but it was an estate in the land itself, upon which the judgment was not a lien. §2669 Burns 1894; *Mark v. Murphy*, 76 Ind. 534; *Bever v. North*, 107 Ind. 544; *Tanguay v. O'Connell*, 132 Ind. 62; *Ohio, etc., Ins. Co. v. Bevis*, 18 Ind. App. 17.

Before a judicial sale of the mortgaged premises this interest was inchoate only; immediately upon such sale, it became perfect or absolute. The appellant could not assert it against the mortgagee so as to prevent the sale of the

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whole of the mortgaged premises because she had joined in the execution of the mortgage; but, immediately upon a sale under the decree, if the proceeds of that sale were more than sufficient to pay the mortgage debt, interest, and costs, she became entitled to an amount equal to one-third of the purchase money, payable out of the excess. This portion of the proceeds of the sale represented and is to be regarded as derived from the wife's interest in the real estate sold.

It is said in Freeman on Judgments, §§303, 303a, that a wife, sued jointly with her husband in an action to foreclose a mortgage, need not set up her inchoate right of dower in the land sought to be sold. A decree in such case will not divest any rights held paramount to the title of the mortgagor when he executed the mortgage. The right of the wife of the mortgagor to dower is such a paramount right, and, if she be made a party after becoming a widow to a suit to foreclose a mortgage, executed by her husband alone, and no allegation be made in the bill in reference to her claim for dower the decree will not be considered as affecting her dower estate.

In order to conclude the wife's right of dower, it must, in all cases, be specifically put in issue where the proceeding is to enforce any claim to which her right of dower was paramount. *Frost v. Koon*, 30 N. Y. 428, 444; *Lewis v. Smith*, 9 N. Y. 502; *Malloney v. Horan*, 49 N. Y. 115; *De Armond v. Preachers' Aid Soc.*, 94 Ind. 59; *Whitney v. Marshall*, 138 Ind. 472.

The rule laid down in regard to an inchoate right of dower applies with equal force to the inchoate estate of the wife in the lands of her husband created by the statutes of this State. In a suit to foreclose a mortgage on the lands of the husband, executed by husband and wife, to which suit general judgment creditors of the husband are made defendants, and to which the wife is a party, it is not necessary that she should set up her inchoate right to one-third of the lands mortgaged, or the proceeds of their sale as

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against the judgment creditors; and when her interest in the land is not specifically put in issue, she will not be concluded by a judgment directing the sale of the land, and the application of the proceeds, after the payment of the mortgage debt, to the discharge of the general judgments against her husband.

In the present case, there is nothing either in the pleadings or in the judgment which concludes the claim of the appellant, Dora Clements, to that portion of the proceeds of the sale of the mortgaged property which was derived from her inchoate estate.

It sufficiently appeared from the averments of the amended complaint that the appellant, Dora Clements, was lawfully entitled, under the statute, to the one-third of the proceeds of the sale of the real estate claimed by her, and that her right thereto was not barred by the judgment.

The demurrer to the cross-complaint of Robert Clements was properly sustained. His interest in the mortgaged premises was subject to the lien of the judgment of Davis and Rankin, and as against them he had no claim whatever to the surplus of the proceeds of sale after the payment of the mortgage debt and costs.

For the error of the court in sustaining the demurrer of the appellees to the complaint of the appellant Dora Clements the judgment is reversed, with instructions to overrule said demurrer, and for further proceedings in accordance with this opinion.

**CHICAGO AND ERIE RAILROAD COMPANY v. THOMAS,
ADMINISTRATOR.**

[No. 18,425. Filed December 19, 1900.]

PLEADING.—*Death by Wrongful Act.—Action.—Complaint.—Railroads.*—A complaint against a railroad company for damages for the death of plaintiff's decedent is not bad on demurrer for failing to allege that actual damages were sustained, where the complaint alleged that decedent left surviving him his wife and an infant son.
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RAILROADS.—*Injury at Crossing.—Contributory Negligence.*—One who attempts to drive over a railway crossing without looking for approaching trains is guilty of contributory negligence, although the view was so obstructed that he could not see approaching trains without going in advance of his team; and the fact that the persons in charge of a train approaching the crossing failed to sound the whistle and ring the bell, as required by law, did not excuse him from the exercise of the caution and vigilance demanded by the known perils of the crossing. pp. 635-640.

From the Huntington Circuit Court. *Reversed.*

W. O. Johnson, J. B. Kenner and U. S. Lesh, for appellant.

J. S. Dailey, A. Simmons, F. C. Dailey and Branyan & Branyan, for appellee.

DOWLING, C. J. —Action for damages for the alleged wrongful killing of appellee's decedent, James L. Platt, at a street crossing on appellant's railroad in the town of Markle.

The complaint is in two paragraphs, to each of which a demurrer was overruled. Trial upon the general issue, general verdict for the plaintiff, and answers to 120 interrogatories. Appellant's motion for judgment upon the answers to interrogatories, notwithstanding the general verdict, was overruled, as was also its motion for a new trial. The action of the court upon the demurrers to the complaint, and upon the several motions, is assigned for error.

The only objection to the complaint pointed out by appellant is the absence from each paragraph of an averment that actual damages were sustained by the death of Platt. Each paragraph of the complaint avers that the decedent left surviving him Alice Platt, his widow, and Fon Platt, a son aged one year, and that both are living. The legal presumption is that both the widow and infant child were entitled to the services of the deceased, and that such services were valuable to both. Such a presumption is sufficient to sustain a complaint against a demurrer which confesses the truth of the averments. *Korrady v. Lake Shore, etc., Co.*, 131 Ind. 261.

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It is next insisted that the court erred in overruling appellant's motion for judgment upon the answers to interrogatories for the reason that the facts disclosed by the answers are such as to require the court to rule, as a matter of law, that the deceased was guilty of contributory negligence.

The following facts are disclosed by the answers to interrogatories: The deceased was about twenty-five years of age. He was killed January 14, 1892. During his whole life he had lived four and a half miles north of Markle, which lies on the south side of appellant's tracks, and he had visited the town on an average of once a week during the last three years of his life. On the day of the accident, he was hauling logs from a point north of the tracks to a mill south of them. He hauled one load in the forenoon of that day, crossing the tracks on Lee street, and after unloading, he returned by the same route. In the afternoon, he crossed at the same point with a second load, and was going to his home by the same way when he was killed. He was using a team of horses hitched to a sled constructed of two planks for runners, curved in front, and held in place by benches connecting the runners, and acting as bolsters. The sled was fourteen inches high from the bottom of the runners to the top of the benches, and the decedent was seated on the forward bench, driving his team north on Lee street, at the time he was killed by a west-bound train on the main track. At the time of the accident, the appellant maintained tracks across Lee street as follows: (1) The main track; (2) north of, and fourteen feet from it, a side-track; (3) north of that, and fourteen feet from it, a second side-track, and (4) south of the main track, and from twenty to thirty feet from it, a third side-track. The space between the main track and the south siding was slightly wider east of the street than at its intersection, and this space was free from obstructions for the distance of 120 feet east of the street, at which point the space was thirty-two feet wide; a pile of lumber was there, the north end of which was twenty

feet from the main track, composed of boards twelve to fourteen feet in length—the ends to the track—the pile being from ten to fourteen feet high. To the east of this, and between said tracks, there were other lumber piles, all nearer the side than the main track, and so placed for convenient loading on the cars. Immediately east of the east line of the street, and south of the side-track, with its north edge as near as it could be placed so as to admit the passage of cars, was a lumber dock, extending eastward along the track 120 feet, forty feet wide from north to south, and about as high as the floor of an ordinary freight car, upon which, at various points, were piled two or three car loads of lumber. Standing on the side-track, just north of the lumber dock, was a freight car, the west end of which was from eight to ten feet east of Lee street. Immediately south of the lumber dock, and connected therewith by a runway, on the east line of Lee street, was Fee's sawmill, two stories high, and 100 feet long, north and south, which was running at the time of the accident. There was a mill on the south side of the tracks, known as Wilkinson's, the west line of which was about 230 feet east of Lee street. For some time before, and at the time of the accident, there was, on the first siding north of the main track, and west of the street, an engine headed west, with twelve or fourteen freight cars attached, the easternmost part of which was near the west line of the street, the train to which they belonged having been cut or divided at the crossing, leaving a part of its cars east of the crossing, and the rest, with the engine attached, west of the street. This train was lying on the siding, awaiting the passage of train number five, which last named train caused the death of the decedent.

At the time of the accident, the decedent's eyesight was good, and his organs of hearing were of ordinary acuteness. Having discharged his last load, Platt drove northward on Lee street to a point twenty or thirty feet south of the south siding where he stopped and held a conversation with some one. He remained seated on the front bench of his

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sled. From that point, he could not have seen a train approaching from the east in time to have started thence and crossed the main track before such train, running at the usual rate of speed, would have reached Lee street; nor could he from that point have seen such train at all until it reached the street. As soon as the conversation ended, he started and drove directly north on the street until the collision occurred, which was about 5 o'clock in the evening. The weather was cold, some snow was falling, and the wind was blowing from the west. Those in charge of the locomotive, drawing train number five, did not, when such locomotive was not less than eighty nor more than 100 rods from Lee street, distinctly sound the whistle three times, nor continuously ring the bell of the locomotive until said locomotive had passed the crossing of Lee street.

Some of the interrogatories, and the answers thereto, are as follows: "If said Platt, in passing over the tracks on the occasion of the accident, had looked eastward from a point in the center of the space, between the main and south side-track, on Lee street, could he have seen a train approaching from the east far enough to have avoided the accident by remaining where he was until it had passed? Answer. No."

"Did Platt, while on his way across the tracks on the day of the accident, when in the space on Lee street between the main and south side-track, look to the eastward to see whether or not a train was approaching from that direction? Answer. No."

"While attempting to pass over said tracks, just before the accident, was the deceased continuously looking to the west or northwest in the direction of the engine and cars attached thereto, and standing west of Lee street on the track first north of the main track? Answer. No, he was looking north and northwest."

"Did the decedent, on the occasion of the accident, and before driving upon the main track, listen for the noise

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which ordinarily accompanies a train in operation? Answer. No evidence."

"On the occasion of the accident, how far could a person of ordinary hearing, listening at Lee street crossing, have heard the noise of train number five approaching from the east? Give distance in rods. Answer. Ten or fifteen rods."

"If said Platt had looked eastward, from the point indicated in the last question (being the first question set out in this opinion), could he have seen a train approaching from the east at the rate of thirty to forty miles per hour far enough so that he might have driven across the main track before it reached the crossing? Answer. Yes,"

"Was there a point at that time on Lee street in the space between the main and south tracks where Platt could, by looking eastward, have seen a train approaching the crossing and traveling at the rate of thirty to forty miles per hour, in time to have avoided the accident, either by remaining in said space, retreating from it, or hastening over it? Answer. Yes."

"Could one, with ordinary visual organs, at the time of the accident, from a point in the center of the space between the main and side-track in Lee street, have seen a train approaching from the east at a distance of 350 feet? Answer. Yes."

It is evident from the answers to the interrogatories that the place where the decedent attempted to cross the railroad track was one of extraordinary peril, requiring the exercise on the part of the traveler of extraordinary care. The number of tracks, the obstructions which prevented approaching trains from being seen, the temporary increase of the danger by the presence of the freight train which had been cut in two on one of the tracks, the state of the weather, and the lateness of the hour admonished the decedent that only by the exercise of unusual vigilance could his safety in crossing be secured. It appears from the answers to the interrogatories that he exercised no caution whatever. If

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cise of due care. The exercise of due care at a railroad crossing, requires the traveler to look and listen before going upon the track. This is undoubtedly the general rule. There are exceptions. The law requires no foolish thing. That which will be ineffectual is excused. Therefore, if Platt by looking could not have seen, or by listening he could not have heard the approaching train in time to have avoided the accident, neither was required. He was only called upon to employ such agencies of information as the perils of the place fairly demanded, and as were calculated to disclose such danger as might be reasonably apprehended from the situation as it then and there appeared. *Pittsburgh, etc., R. Co. v. Burton*, 139 Ind. 357.

As set forth in the main opinion the answers to interrogatories show that Platt from the point where he sat on his sled in conversation with another south of the south side-track, could not have seen a train approaching from the east until it reached the crossing. This on account of obstructions consisting of Fee's sawmill, 100 feet long north and south, the dock forty feet long, with two or three car loads of lumber thereon, the freight car, and piles of lumber between the main and south side-track. It is also found (number forty-eight) that if Platt had looked eastward from a point in the center of the space between the main and south side-track, he could not have seen a train approaching from the east far enough to have avoided the accident by remaining where he was until it had passed. And by number fifty-one, that from a point in the center of the space between the main and south side-track, one with ordinary visual organs could have seen a train approaching from the east a distance of 350 feet. And by number forty-nine, that if Platt had looked eastward from said center point he could have seen *a train* (not the train) approaching from the east at a rate of thirty to forty miles per hour, far enough so that he might have driven across the main track before it reached the crossing. This means that when

Platt reached this first point of possible observation, and when he, seated on the front bench of his sled would have been within twelve feet of the main track, and his horses actually entering upon it, if the approaching train had been at the remotest point of view, to wit, 350 feet, he could have escaped by driving over the track. He could not have remained where he was and escaped. Having reached this first point whence he could have seen up the track so far as 350 feet his only safety was in going forward. And this is precisely what he was trying to do. To have stopped his team at this point to look and listen with his horses on the track, would have been positive negligence. Having entered within the line of danger due care required him to pass speedily out of it. It is suggested that he should have left his team and gone forward to the main track and made careful investigation before attempting the crossing. How would that have aided him? If he had left his team south of the south siding and gone to the main track, and no train appearing within the limit of his view, or being within 1,000 feet for that matter, which latter distance would have been covered by a train running forty miles per hour, in about seventeen seconds, and 350 feet in less than six seconds, could he have returned to his team, gotten upon his sled, started his horses and driven over the main track before the train had reached the crossing?

And his ability to hear the noise of the approaching train seems quite as impossible. Let us see. Fee's milling house two stories high, the lumber on the dock, Wilkinson's sawmill, the freight car on the south siding, the piles of lumber between the main and south side-track, constituted an unbroken, intervening obstruction to sound. Fee's sawmill was running, it was snowing, the wind blowing from the west, a locomotive standing on the first siding north of the main track was blowing off steam and on the locomotive drawing the approaching train neither the bell was being rung, nor the whistle sounded, and from these conditions

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the jury answered (number ninety-three) that a person of ordinary hearing, listening at Lee street crossing (that is from the center of the main track) could have heard the noise of the approaching train ten or fifteen rods (160 or 247 feet). What use then of listening south of the south siding or at any other place while behind Fee's mill or the other obstructions extending south from the main track 165 feet? Under the special facts disclosed, so far as serving him in learning the real danger was concerned, Platt might as well have been without eyes or ears until he reached such relation to the main track that his only possible safety was to hasten over it.

The failure to look and listen before entering upon a railroad crossing, when the eye and ear may clearly be useful in discovering the approach of trains in time to avoid injury, is negligence *per se* and belongs exclusively to the court to characterize, but when extraordinary conditions exist to make the question of effective seeing and hearing doubtful; and when unusual and unexpected appearances suddenly arise at a crossing either of safety or peril, which are naturally inclined to control differently the conduct of equally prudent persons in like place, so that ordinary conduct in such situation may be subject to more than one inference and to an honest difference of opinion among men of equal intelligence and prudence, then in such cases the question of negligence or due care is not one of law but one of fact for the jury. *Baltimore, etc., R. Co. v. Walborn*, 127 Ind. 142, and cases cited; *Cleveland, etc., R. Co. v. Harrington*, 131 Ind. 426; *Cincinnati, etc., R. Co. v. Grames*, 136 Ind. 39; *Cleveland, etc., R. Co. v. Moneyhun*, 146 Ind. 147, 34 L. R. A. 141; *Grand Rapids, etc., R. Co. v. Cox*, 8 Ind. App. 29; *Pittsburgh, etc., R. Co. v. Burton*, 139 Ind. 357, 373; *French v. Taunton Branch Railroad*, 116 Mass. 537; *Huckshold v. St. Louis, etc., R. Co.*, 90 Mo. 548, 2 S. W. 794; *Missouri Pac. R. Co. v. Lee*, 70 Tex. 496, 7 S. W. 857; *Teipel v. Hilsendegen*, 44 Mich. 461, 7 N. W. 82.

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In the last case cited, Judge Cooley says: "If the circumstances are such that reasonable minds might draw different conclusions respecting the plaintiff's fault, he is entitled to go to the jury upon the facts."

In the Harrington case, 131 Ind. 426, the plaintiff was forty years old, well acquainted with the crossing, and of good sight and hearing. There were four tracks at the crossing over one of which, as she approached on foot, a freight train was passing north. When at a distance of thirty-seven feet from the track, she could see north up the track, upon which she was injured, 400 feet. At this point she looked, and, seeing no train, continued her course over the tracks looking in a southwest direction and was caught and injured by a train from the north. The train was running at a greater rate of speed than was allowed by city ordinance and no bell was being rung. With respect to these facts, the court says: "In our opinion the decided weight of authority is that under the facts and circumstances in this case, the question of contributory negligence was a question for the jury under proper instructions from the court."

The situation at the crossing at the time of the accident was extraordinary, and abounded in conditions unusual, unexpected and deceptive. It was in the dusk of the evening, and snowing and wind blowing from the west; there was the noise of Fee's mill, of the steaming locomotive, the obstructions to sight and sound, the total absence of the usual signals of an approaching train—a warning required by law, and which the decedent had the right to believe would be given,—coupled with the reasonable right to believe that the sounding whistle and ringing bell could be heard above the din existing at the crossing, and for the want of it, the right to believe that no train was near. Thus confronted he was called upon to act, or abandon the use of the highway. He was entitled to its use. His right to use it was equal to the right of appellant and it seems to me a harsh rule that will require of him the absurd, or the impossible—made so

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largely by the appellant itself—as a condition of exoneration from fault. Such a rule is a practical denial of the right to use a crossing at all in cases of this sort.

It seems to me most probable that all men of equal prudence and intelligence, in like place, would not act in the same way, and, therefore, under the weight of authority, the conduct of the decedent with respect to negligence, or due care, under the circumstances surrounding him, was properly submitted to the jury.

CAIGER v. THE STATE.

[No. 19,855. Filed December 19, 1900.]

CRIMINAL LAW.—Larceny.—Instruction.—Power of Jury to Fix Penalty.—Where an indictment in separate counts charges petit and grand larceny an instruction to the jury that if they find the defendant guilty the court will fix the punishment, is erroneous, since the jury might assess the punishment of petit larceny at imprisonment in the county jail, if the same was deemed adequate punishment for the offense.

From the Elkhart Circuit Court. *Reversed.*

H. C. Dodge and *O. M. Conley*, for appellant.

W. L. Taylor, Attorney-General, *C. C. Hadley*, *Merrill Moores*, *C. G. Sims* and *C. E. Frank*, for State.

MONKS, J.—An indictment in four counts was returned in the court below against appellant. The first count charged the offense of petit larceny, the second, grand larceny, the third, receiving stolen goods of the value of less than \$25, and the fourth, receiving stolen goods of the value of \$25.

The trial of said cause resulted in a verdict of guilty of petit larceny as charged in the first count of the indictment, and over a motion for a new trial the court assessed the punishment, under the indeterminate sentence law, that appellant be confined in the Indiana Reformatory not less than one nor more than three years, etc.

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The action of the court in overruling the motion for a new trial is called in question by the assignment of errors. Among the instructions given by the court was the following, numbered six: "The law applicable to these two charges is slightly different. If the defendant did steal, take and carry away any of the property mentioned in this indictment, within the two years last past prior to the indictment, within the county of Elkhart and State of Indiana, then your verdict will be for the State, and the amount of the punishment will be fixed by the court under the statute." The giving of this instruction was assigned as a cause for a new trial.

In *Hicks v. State*, 150 Ind. 293, this court held that the statutes providing for punishment of felonies by imprisonment in the county jail or in the State prison, in the discretion of the court or jury trying the cause, were not repealed by the indeterminate sentence law nor by the Indiana Reformatory act as to the provision for imprisonment in the county jail, but that the court or jury trying such cases might, after said acts were passed, assess the punishment of imprisonment in the county jail, if the same was deemed adequate punishment for the offense. If not deemed adequate, however, then the finding must be made or verdict returned under the indeterminate sentence law. The following cases are to the same effect. *Zeilinski v. State*, 150 Ind. 700; *Bealer v. State*, 150 Ind. 390, 392, 393; *Barnard v. State*, 150 Ind. 701.

The offense of petit larceny charged in the first count, and the offense of receiving stolen goods of the value of less than \$25 charged in the third count, may be punished by imprisonment in the county jail for any period not more than one year, with a fine and disfranchisement. §§2007, 2012 Burns 1894, §§1934, 1935 R. S. 1881 and Horner 1897. The jury in said cause, if they found appellant guilty as charged in either said first or third counts, had the right therefore to assess the punishment at imprisonment in the

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county jail for any period they might decide upon, not more than one year, and that he be fined and disfranchised, if they deemed the same adequate. *Zeilinski v. State*, 150 Ind. 700, and cases cited, *supra*.

By said instruction six the court informed the jury that they had no such power but that if they found appellant guilty of larceny, the court fixed the punishment under the statute. Said instruction was clearly erroneous. The instruction was not limited to the second count, which charges grand larceny but applied to both the first and second counts. If the jury had found appellant guilty of grand larceny, as charged in the second count instead of petit larceny, as charged in the first count, it may be that said instruction would have been harmless; but under the verdict returned it does not appear from the record that said instruction was harmless.

Judgment reversed, with instructions to sustain appellant's motion for a new trial and for further proceedings not inconsistent with this opinion.

THE MARION MANUFACTURING COMPANY v. HARDING.

[No. 18,780. Filed Oct. 11, 1900. Rehearing denied Dec. 20, 1900.]

SALES.—Warranty.—Action for Purchase Price of Machinery.—Where the seller of threshing machinery agreed with the purchaser that if the machinery did not do good work after a fair trial he would take it back and surrender the notes, and the machinery after a fair trial failed to do good work, the seller cannot maintain an action on the notes. *pp. 649, 650.*

SPECIAL FINDING.—Harmless Error.—In an action on promissory notes given for the purchase price of machinery in which it was determined that plaintiff take nothing by the action, a conclusion of law that defendant was entitled to a cancelation of the notes and a release of the mortgage was not reversible error because of the fact that no cross-complaint was filed asking for their cancelation, since plaintiff was not harmed by being compelled to surrender notes which could not be enforced. *pp. 650, 651.*

155	648
160	91
155	648
165	85

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PRACTICE.—Special Finding.—Amendment.—The court may amend the special finding of facts during the term in which the judgment was rendered and after overruling a motion for a new trial. *p. 651.*

PRINCIPAL AND AGENT.—Notice.—Notice to an agent is notice to the principal of any matter that is within the scope of the agency. *pp. 651, 652.*

From the Marion Superior Court. *Affirmed.*

H. S. McMichael and *W. R. Clarke*, for appellant.

W. N. Harding and *A. R. Hovey*, for appellee.

BAKER, C. J.—Appellant unsuccessfully sought to recover on notes and to foreclose a chattel mortgage executed by appellee. The assignments are that the court erred (1) in overruling the demurrer to the answer, (2) in stating conclusions of law on the special findings of fact, (3) in setting aside its judgment and making additional findings of fact, and (4) in overruling the motion for a new trial.

The answer admits the execution of the notes and mortgage. In avoidance of appellant's right of recovery, appellee set up the following facts: The notes and mortgage were executed on June 16, 1896, to evidence and secure the payment of the purchase price of threshing machinery sold that day by appellant, a corporation of Marion, Ohio, to appellee in Marion county, Indiana. On May 9, 1896, appellee signed a written order for the machinery. The order was made out on a printed blank at appellant's agency at Indianapolis, Indiana. The order contained specific warranties of the machinery, which were to be binding on appellant if the order was accepted by the home office; stipulated that no other warranty would be recognized; and provided that the purchaser forfeited all claims under the warranty by failing to give immediate notice of defects by registered letter to appellant at Marion, Ohio. On May 12, 1896, before appellant accepted the order, appellee countermanded it and notified appellant that he would not take the machinery. On June 4, 1896, appellant notified appellee that if he would take the machinery he could transact all

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business in relation to the purchase and warranty of the machinery directly with appellant's Indianapolis agency, orally represented that the machinery was of good material and workmanship and would thresh from 1,500 to 3,000 bushels of grain per day, and offered, if the machinery did not do good work after a fair trial, to take it back and surrender the notes which were to be given for the purchase price. On June 16, 1896, appellee accepted the machinery under the foregoing offer and executed the notes and mortgage in suit. Appellee performed all the conditions of the contract on his part. But the machinery was of poor material and workmanship, and was defective (in many particulars elaborately specified in the answer). Appellant kept endeavoring to overcome the defects during the threshing season of 1896, urged appellee to try the machine further in 1897, and promised to make it do good work or take it back. But appellant totally failed to put the machinery in condition to do good work. During the summer of 1897 appellee several times offered to return the machinery, but appellant insisted on appellee's keeping it and trying it further. Finally, on October 8, 1897, appellee shipped the machinery to appellant at Marion, Ohio, and demanded the return of his notes.

The answer is voluminous and somewhat confused in structure; but the foregoing epitome exhibits the material and controlling facts. The answer was a complete bar. Appellant could not maintain its suit for the purchase price of machinery which it agreed to take back if the machinery, after a fair trial, would not do good work,—if appellee did give the machinery a fair trial and it then failed to do good work. *McCormick, etc., Co. v. Hays*, 89 Ind. 582; *McCormick, etc., Co. v. Gray*, 100 Ind. 285; *National Bank, etc., Co. v. Dunn*, 106 Ind. 110; *Seiberling & Co. v. Newlon*, 16 Ind. App. 374; *Champion Machine Co. v. Mann*, 42 Kan. 372, 22 Pac. 417.

The special findings of fact fully cover all the material

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averments of the answer. The conclusions of law that appellant take nothing by its suit, and that the machinery is the property of appellant, are inevitable. If the conclusion that appellee is entitled to a cancelation of the notes and a release of the chattel mortgage is erroneous because no cross-complaint was filed (and a single pleading can not be both an answer and a cross-complaint), appellant is not harmed by being compelled to surrender notes it can not enforce.

The special findings of fact and conclusions of law were filed June 29, 1898. On July 1, 1898, appellant filed a motion for a new trial, which was at once overruled, seventy days' time was given for filing bills of exceptions, and judgment for appellee was entered. On July 2, 1898, the court set aside the entry of July 1st, and added to the finding certain facts which were in evidence but were not included in the finding filed June 29th. Appellant filed a motion for a new trial, which was overruled, time was given for filing bills of exceptions, and judgment was again entered. These proceedings were all had at the same term. The cause was *in fieri*, and the court was authorized to amend the finding so that it should include all the material facts that the court believed to have been proved. *Thompson v. Connecticut, etc., Ins. Co.*, 139 Ind. 325; *Jones v. Mayne*, 154 Ind. 400.

It is contended that the finding of the court was contrary to law and not sustained by sufficient evidence. There was evidence tending to prove all the material facts found by the court. One Newby, as shown by the evidence, was appellant's state agent in charge of its office at Indianapolis. He was appellant's agent to sell machinery and his powers were general. He sold appellee the machinery upon a warranty, and the sale was not complete until the machinery was made to comply with the warranty. What the agent did in remedying the defects in the machinery was in the line of perfecting the sale, and within the scope of the agency. *Springfield, etc., Co. v. Kennedy*, 7 Ind. App. 502; *Port Huron, etc., Co. v. Smith*, 21 Ind. App. 233. It is a well settled

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rule that notice to an agent is notice to the principal of any matter that is within the scope of the agency. *Pittsburgh, etc., Co. v. Ruby*, 38 Ind. 294, 10 Am. Rep. 111; *Phoenix, etc., Ins. Co. v. Hinesley*, 75 Ind. 1; *North British, etc., Co. v. Crutchfield*, 108 Ind. 518; *Indiana, etc., R. Co. v. Snyder*, 140 Ind. 647; *Springfield, etc., Co. v. Kennedy*, 7 Ind. App. 502; *Port Huron, etc., Co. v. Smith*, 21 Ind. App. 233.

A question is made in the briefs concerning the earnings of the machine while in appellee's possession. That is outside the issues.

Judgment affirmed.

TRITTIPO ET AL. v. BEAVER ET AL.

[No. 18,844. Filed December 20, 1900.]

DRAINS.—Remonstrance.—Appeal.—Trial.—Burden of Proof.—Upon appeal to the circuit court from an order of the board of commissioners establishing a drain, all questions raised by remonstrance before the board are to be tried *de novo*, and the burden is upon the petitioners to establish by evidence such facts as were necessary to be established before the board, if such facts are controverted by remonstrance. *pp. 654-656.*

SAME.—Remonstrance.—A remonstrance against the establishment of a drain on the ground that the costs and damages would exceed the benefits presents a legal objection to the proposed work as a whole. *pp. 657, 658.*

From the Hamilton Circuit Court. *Reversed.*

F. E. Gavin, T. P. Davis and J. L. Gavin, for appellants.
J. A. Roberts and Meade Vestal, for appellees.

BAKER, J.—Appellees filed with the board of commissioners of Hamilton county a petition for the establishment of a drain. Viewers were appointed. They reported that the drain would be of public utility and conducive to public health, and assessed the benefits and damages, etc. Appellant Samuel Trittippo appeared before the board and remonstrated against the petition and the report of the

155	652
156	657
156	691
155	652
159	10
155	652
163	235
163	486
155	652
167	30
155	652
171	111
171	718

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viewers on the grounds (1) that his assessment was too high; (2) that the damages allowed him were too low; (3) that his real estate would not be benefited; (4) that the drain as proposed would not be of public utility and would not benefit public health. Appellant John Beaver remonstrated on the grounds (1) that his assessments were too high; (2) that his lands would be damaged; (3) that the cost of the drain would exceed the benefits; (4) that there was a better route than that proposed; (5) that he ought to be allowed for ditches already constructed; (6) that the proposed drain would not be of public utility and would not benefit public health. Trittipo and John Beaver each filed the required bond, and reviewers were appointed who confirmed the report of the viewers. From the decision of the board establishing the drain, the remonstrators appealed to the circuit court. Trial by jury. Finding for the petitioners, that the drain would be of public utility and conducive to public health; that the assessments as approved by the board were in proportion to the benefits; that the ditch should be established and constructed according to the profile and survey and the order of the board; that Trittipo should be allowed no other damages than those reported by the viewers; and, that the assessments of John Beaver were in proportion to his benefits to be derived from the construction of the drain. Separate motions for a new trial overruled and exceptions. Judgment was rendered on the verdict for appellees, and the cause was remanded to the board with directions to establish the ditch in accordance with the judgment. The only errors assigned question the court's rulings on the motions for a new trial.

Upon the trial appellees took the open and close, without objection. In making their original case appellees introduced evidence tending to prove that the proposed drain would be of public utility and conducive to public health, describing the territory to be drained and the condition of the swamp lands at different seasons as to stagnant water,

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etc. The appellants on defense introduced evidence tending to prove that the proposed drain would not be of public utility nor conducive to public health; that the proposed route was not practicable; that the lands of appellants would not be benefited; and that appellant Trittipo's lands would be damaged. In rebuttal appellees introduced evidence to show the amount appellants' lands would be benefited.

Appellants' first contention is that the court erred in giving the following instruction: "In a case of this kind, where remonstrators appeal from the order of the board of commissioners establishing a drain or ditch, the burden of proof is upon the said remonstrators to establish the allegations in their remonstrances." In support of this instruction appellees rely upon the cases of *Metty v. Marsh*, 124 Ind. 18, *Denton v. Thompson*, 136 Ind. 446, and *Wilson v. Talley*, 144 Ind. 74. The last two cases are based upon the rulings in *Daggy v. Coats*, 19 Ind. 259, and *Metty v. Marsh, supra*. In *Daggy v. Coats* the record discloses that the only issue made by remonstrant Daggy, before the board and in the common pleas on appeal, related to the damages to his land. At the trial in the common pleas no evidence was introduced on either side. The court instructed the jury to find for the petitioners. The ruling was affirmed on appeal to this court. The decision is sustainable on the theory that the petition and reports of the viewers and reviewers were to be regarded as the pleadings on the side of the petitioners; that, since Daggy had failed to put in issue any of the matters necessary to the establishment of the proposed work, the petitioners were entitled to judgment on the pleadings on the issues tendered relating to necessity, utility, practicability, and sufficiency of means to cover cost of construction and damages; that Daggy had the burden of proof on the issue made in regard to his claim of damages; and that the finding should be against him on that issue for failure of proof. In *Metty v. Marsh* an appeal was taken from an order of the board establishing a ditch,

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to the circuit court, by Metty and others who had filed no remonstrances before the board. They moved to dismiss the proceeding on account of the insufficiency of the petition. Upon the overruling of this motion, the petitioners moved for judgment on the petition and reports of the viewers and reviewers. The appellants asked but were denied leave to file remonstrances. The court thereupon sustained the petitioners' motion for judgment. The ruling was affirmed on appeal to this court. The decision is sustainable on the theory that the petition and reports of the viewers and reviewers were to be regarded as the pleadings on the side of the petitioners; and that, since the appellants had failed to take issue thereon, the petitioners were entitled to judgment on the pleadings. But the *Daggy* and *Metty* cases are not supportive of the proposition that the burden of proof is on the remonstrants on all issuable matters. Yet in *Denton v. Thompson, supra*, and *Wilson v. Tally, supra*, those cases were taken as establishing the doctrine that the reports of the viewers and reviewers were to be treated as evidence in the circuit court on appeal and were to stand until overthrown by a preponderance of evidence introduced by the remonstrants. The *Denton* and *Wilson* cases run counter to the otherwise uniform holdings of this court, and are therefore overruled on the question under consideration.

By a long line of decisions, it is established that upon appeal to the circuit court from the board of commissioners all questions raised by remonstrance before the board are to be treated *de novo* in the circuit court, and on the issues made by remonstrance neither the report of the viewers nor the judgment of the commissioners has any force or effect as a basis of a judgment or as evidence. *Coyner v. Boyd*, 55 Ind. 166; *Freck v. Christian*, 55 Ind. 320; *McKinsey v. Bowman*, 58 Ind. 88; *Turley v. Oldham*, 68 Ind. 114; *Beck v. Pavey*, 69 Ind. 304; *Schmied v. Keeney*, 72 Ind. 309; *Corey v. Swagger*, 74 Ind. 211; *Grimwood v. Macke*, 79 Ind. 100; *Cox v. Lindley*, 80 Ind. 327; *Coolman v.*

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Fleming, 82 Ind. 117; *Green v. Elliott*, 86 Ind. 53; *Breitweiser v. Fuhrman*, 88 Ind. 28; *Meehan v. Wiles*, 93 Ind. 52; *Burns v. Simmons*, 101 Ind. 557; *Reynolds v. Shults*, 106 Ind. 291; *Black v. Thomson*, 107 Ind. 162; *Hardy v. McKinney*, 107 Ind. 364; *Ford v. Ford*, 110 Ind. 89; *Bohr v. Neuenschwander*, 120 Ind. 449; *Mills v. Hardy*, 128 Ind. 311; *Chandler v. Beal*, 132 Ind. 596; *Goodwin v. Evans*, 134 Ind. 262; *Chandler v. City of Kokomo*, 137 Ind. 295; *Castle v. Bell*, 145 Ind. 8; *Head v. Doehleman*, 148 Ind. 145.

Upon appeal the cause stands as any other adversary proceeding. The petition and the reports of the viewers and reviewers are considered as the plaintiff's complaint and the remonstrance as the defendant's answer, and only such facts as are not controverted by the remonstrance stand admitted as true. It follows, therefore, that upon appeal it is incumbent upon the plaintiffs (petitioners) to establish, by evidence, such facts as were necessary to be established before the board, if those facts are controverted by remonstrance. Section 4285 R. S. 1881 and Horner 1897, §5655 Burns 1894, empowers the board of commissioners to cause drains to be constructed, "when the same shall be conducive to the public health, convenience or welfare, or when the same shall be of public benefit or utility". Section 4294 R. S. 1881 and Horner 1897, §5664 Burns 1894, provides that if "the board find the proposed drain to be of public utility, or conducive to public health, or of public benefit or convenience, it shall establish the same". These facts may be controverted by the remonstrants and tried on appeal in the circuit court, and, if controverted, the burden is upon the plaintiffs (petitioners) to establish these facts, by evidence, in order to make a *prima facie* case. Since the appellants introduced some evidence tending to prove that the drain would not be of public utility nor conducive to public health, the giving of the instruction was harmful error.

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The court also gave this instruction: "If you find the assessments and damages as made and reported by the viewers are in all respects correct and are in just and equal proportion and that said ditch is of public utility, your verdict should be on all questions in issue for the petitioners." And the court refused to give the following, requested by appellants: "If the aggregate cost of the construction of the proposed ditch and the damages, if any, that will be the result of such construction exceed the aggregate benefits of the ditch when constructed, the proposed ditch should not be constructed. In other words, neither of the defendants can be assessed for the construction of the proposed ditch, if the aggregate cost of the construction thereof and the damages incident thereto exceed the aggregate benefits." One ground of remonstrance before the board was that the costs and damages exceeded the benefits. Appellants claim that the court's action in giving and refusing the above instructions was erroneous because the court thereby excluded this ground of remonstrance from the consideration of the jury. Two questions arise: Is the ground stated a legal ground of remonstrance? If so, may the remonstrants renew that objection on appeal?

1. The statute requires that the viewers shall report an estimate of the total cost of the proposed work, a schedule of the damages, and a schedule of the benefits. The statute provides that the cost of the work and the damages must be paid out of the assessments for benefits. The statute forbids the letting of contracts for more than the estimated cost of the work. Here is a scheme, at the heart of which lies the necessity that the cost and damages shall not exceed the benefits. The statute provides that any interested person may file with the board "a remonstrance against the ditch as located by the viewers on and across his lands, by setting forth his grievances therein". The grounds of remonstrance are not limited by the statute. Therefore, under

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the general right, a party in interest may set forth any matter as a ground of remonstrance that is a legal objection to the proposed work as a whole, or that is a legal objection to his particular assessment of benefits or damages.

2. But it was within the legislative discretion to limit the matters regarding which an appeal might be taken. In *Denton v. Thompson*, 136 Ind. 446, *Steele v. Empson*, 142 Ind. 397, and *Wilson v. Tally*, 144 Ind. 74, it was held that §4301 R. S. 1881 and Horner 1897, §5671 Burns 1894, limits the right of appeal to presenting to the circuit court the following questions: "*First*. Whether said ditch will be conducive to public health, convenience or welfare. *Second*. Whether the route thereof is practicable. *Third*. Whether the assessments made for the construction of the ditch are in proportion to the benefits to be derived therefrom. *Fourth*. The amount of damages allowed to any person or persons or corporation." In rendering those decisions the language of the section was evidently misinterpreted. The section reads: "Any person or corporation aggrieved thereby may appeal from any final order or judgment of the board of commissioners, made in the proceedings and entered upon their record, determining either of the following matters: *First*. Whether" and so on, setting out the four clauses hereinabove copied. The right of appeal is general as to persons aggrieved, and is general as to subject-matter, provided only that the judgment appealed from determines at least one of the stated questions. A remonstrant, therefore, is entitled to a trial *de novo* in the circuit court on all issues made by him before the board. If the issue presents a legal objection to the proposed work as a whole, the burden of proof is upon the petitioners. If the issue presents only a legal objection to the remonstrant's particular assessment of benefits or damages, the burden is upon the remonstrant. In this case, the ground of remonstrance that the costs and damages exceeded the benefits presented a legal objection to the proposed work as a whole,

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and the court erred in giving and refusing the instructions last above quoted.

Appellants also complain of the refusal of a requested instruction regarding the measure of benefits. The instruction states the rule correctly, but the substance of it was probably embodied with sufficient clearness in other instructions that were given.

Judgment reversed, with directions to sustain the motions for a new trial.

Monks, J., absent.

THE RICHMOND NATURAL GAS COMPANY v. CLAWSON.

[No. 18,550. Filed December 21, 1900.]

GAS.—Discriminating Charges.—Enforcement.—A rule promulgated by a natural gas company engaged in furnishing gas to the public under a franchise of a city fixing the price of gas to consumers at twelve and one-half cents per thousand cubic feet when used for fuel purposes only, and, when used by consumers for both fuel and illuminating purposes, at twenty cents per thousand cubic feet for both purposes, unjustly discriminates against consumers who use gas for both purposes, and cannot be enforced.

From the Wayne Circuit Court. *Affirmed.*

J. F. Robbins and *T. J. Study*, for appellant.

A. C. Lindemuth, for appellee.

JORDAN, J.—Appellee successfully prosecuted this action in the lower court, to enjoin appellant from shutting off his supply of natural gas from his residence situated in the city of Richmond.

The errors assigned are based upon overruling appellant's demurrer to the complaint, denying its motion for a new trial, and upon exceptions reserved to the several conclusions of law stated by the court upon its special finding of facts. The special finding of facts discloses substantially the following: The Richmond Natural Gas Company was incorporated on the 5th of March, 1886, under the laws of this State, and obtained a franchise or privilege from the

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city of Richmond, Wayne county, Indiana, granting the said company the right to lay under its streets, alleys and avenues, etc., its gas pipes and mains for the supply of natural gas to said city and the citizens thereof, subject to the conditions and regulations in the ordinance set out and provided. One of the objects for which said company seems to have been incorporated was to supply consumers of the city of Richmond, and in the vicinity, with natural gas.

Section one of the ordinance of the city, under which the franchise was granted to appellant gas company, reads as follows: "Be it ordained by the common council of the city of Richmond, That 'The Richmond Natural Gas Company' of said city be and is hereby granted the right to lay under the surface of such of the streets, alleys, lanes, avenues and thoroughfares in said city as may be necessary therefor, gas pipes and mains for the supply of natural gas to said city and the citizens thereof, subject to the conditions and regulations hereinafter set out and provided."

Section nine of the same ordinance is as follows: "Any and all residents of said city shall have the absolute right to use the gas along the lines, mains and pipes laid by said company hereunder, and no regulations respecting tapping or connections with said mains or pipes by citizens shall be made which do not apply alike to all citizens. And in case said company shall not make and publish reasonable regulations permitting any and all citizens to tap their mains and pipes for the purpose of taking gas therefrom, for the use of said person or company, then and in any such case the common council of said city shall have power and authority hereunder to authorize any such person, company or corporation, on application to said council, to tap said pipes under the supervision and direction of the civil engineer of the said city. All right of tapping mains and pipes hereunder shall be subject to the payment by the person, company or corporation tapping the same, of such

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rates as are fixed by said company for the general use of such gas, or by agreement of such person and said company."

Appellant duly accepted in writing the provisions and conditions of the ordinance heretofore mentioned on the 15th day of March, 1886, and thereafter, in the month of December, 1888, began to supply natural gas to the consumers of the city of Richmond, and from that time on it has continued to furnish, and is still furnishing, natural gas to consumers of that city.

For the first two years from the time appellant began to furnish natural gas to consumers in the city of Richmond, it furnished the same through mixers, but thereafter the company put in meters and supplied its consumers, when requested, with gas by meter measurement, and has so continued, and it now has from 1,200 to 1,300 patrons who pay for the natural gas consumed by meter measurement at so much per 1,000 cubic feet.

In the year 1893, and up to the date of the commencement of this action, appellant was notified by divers of its patrons in said city at the time they applied to it for meters that they desired to and intended to use such natural gas for illuminating purposes as well as for heating their houses, and with a full knowledge and notice of such fact appellant supplied and put in the meters so requested, and the consumers thereafter used and consumed natural gas both for illuminating and heating purposes continuously; and appellant received and accepted pay from its patrons for gas which had been consumed for both heating and light. The rate of gas so consumed up to the 1st day of October, 1897, was fixed by the gas company at the uniform rate of twelve and one-half cents per 1,000 cubic feet. Appellant received payment at such rates from its consumers with the knowledge that gas had been consumed for both heating and illuminating purposes; and appellant, with such knowledge, took no steps or action to prevent the

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use of such natural gas by its patrons for illuminating purposes. The price charged by appellant for gas supplied by it to any and all of its consumers, other than manufacturers, by meter measure, after it adopted, as heretofore stated, that method, up to the 1st day of October, was twelve and one-half cents per 1,000 cubic feet whether said gas was used for heating alone or for both heat and light. Consumers which were classed as domestic included all residences, stores, etc.

On the 1st day of September, 1897, appellant company adopted and promulgated the following notice, to wit: "Notice to consumers of natural gas. Beginning October 1, 1897, the rate for natural gas, when used for fuel and light, will be twenty cents per 1,000 cubic feet. When used for fuel only, the rate will be the same as heretofore, twelve and one-half cents per 1,000 cubic feet. Richmond Natural Gas Company."

Appellee, Clawson, is now, and has been for more than twenty-five years last past, a *bona fide* resident of the city of Richmond, Wayne county, Indiana, and has occupied, for more than five years last past, and still occupies a dwelling-house and residence situated in said city, number forty-two North Seventh street, with his family consisting of himself, his wife and two children. Prior to the time appellee began using natural gas supplied by the defendant by meter measure, he had been one of the appellant's patrons and had used and consumed its gas for heating purposes through mixers. In September, 1896, he fitted, and caused to be fitted by an experienced plumber, his house with necessary gas pipes, fixtures, and Welsbach burners for the purpose of using and consuming the said natural gas of the defendant, for illuminating purposes in his said house as well as for heating the same. A short time before piping his said residence and fitting the same up for the use of natural gas for both heating and light, appellant furnished appellee with a meter and placed the same in his

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residence and made the proper connections for consuming its gas by meter measurement, for which meter appellee paid appellant the sum of \$15. Thereafter appellee consumed and used the gas supplied to him by appellant for both heating and lighting purposes in his residence, consuming the same for heating purposes in two stoves and one grate and for lighting in three rooms by single jets which were furnished with Welsbach burners; and thereafter appellee paid appellant monthly the uniform rate of twelve and one-half cents for each 1,000 feet of natural gas used and consumed by him for heating and lighting, as shown by said meter.

On the 1st day of September, 1897, appellee received from appellant the notice adopted by it, and heretofore set out, in respect to the change in the rate of gas when used both for fuel and illuminating purposes. About the 1st day of October, 1897, appellee called at the office of appellant in the city of Richmond and notified it that he was using gas for both heating and lighting his residence by meter measure and that he desired to continue to use gas for such purposes, stating that he was willing to pay twenty cents per 1,000 cubic feet for gas for lighting purposes and twelve and one-half cents per 1,000 feet for heating purposes, but that he objected and refused to pay twenty cents per 1,000 feet for such gas when used for both heat and light. Appellee at that time demanded of appellant that it furnish him with a separate meter with which to measure the gas used and consumed by him for light, to be measured separate and apart from that used by him for heat, and tendered to appellee the sum of \$15, the same being the price charged by it for meters. Appellant refused this request of appellee, and thereupon the latter asked the permission and consent of appellant to put in such separate meter for himself, which permission appellant refused to give. Appellee thereafter continued to use and consume natural gas furnished him by appellant for both heat and light during the

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said month of October, 1897. On the 1st day of November, 1897, he received from appellant a statement of the gas consumed by him during said month of October and was charged therefor at the rate of twenty cents per 1,000 cubic feet, making a total of \$3.80. On the 2nd or 3rd day of November, 1897, appellee called at the office of appellant and tendered to it the sum of \$2.38, the same being at the rate of twelve and one-half cents per 1,000 cubic feet for the gas which he had consumed during the said month of October, which sum appellant refused to accept and appellee was informed by its proper officers that if he put in a separate meter without the company's consent, or refused to pay the gas bill demanded of him by the company at the rate of twenty cents per 1,000 feet, they would shut off his gas.

Appellee had previously at all times paid appellant all gas bills and had complied with its reasonable rules and regulations and was still willing to do so. Appellant, at the time of the commencement of this action, was threatening to enforce the rule, which is hereinbefore referred to, against appellee, and to charge both him and all other domestic consumers who used its natural gas for heating and illuminating purposes the sum of twenty cents per 1,000 cubic feet, but would permit all other domestic consumers, who used said gas for fuel alone, to do so at the uniform rate of twelve and one-half cents per 1,000 cubic feet.

Appellant has enforced the rule since the 1st day of October, 1897. Appellee has fitted up and plumbed his house for the use of said natural gas and his stoves and grates are fitted with the necessary and proper burners for the use of natural gas for heating purposes, and in doing so he has been subjected to considerable expense and his residence, at the time of the commencement of this action, was not fitted or adapted to the use of any other fuel or gas for heating and illuminating purposes. In the event the

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supply of gas was shut off and he was deprived of the use thereof by appellant, he would be required to remove the burners from his stoves and grates and to adapt and change his house at considerable expense in order successfully to use other fuel for heating and lighting purposes and he and his family would thereby be liable to suffer great loss and injury.

It is disclosed by the special finding that at the time appellant began to furnish its natural gas to the citizens of the city of Richmond, there was located within that city, and ever since has been, an incorporated artificial gas company engaged in the business of furnishing artificial gas for the lighting of dwellings, stores, shops and houses generally of the citizens of the city, which were all properly adapted for illuminating, which artificial gas company, as the court finds, is now and for many years last past has been, charging and receiving, as its price for its gas so furnished, \$1.50 per 1,000 cubic feet, or \$1.20 in the event the bill for gas is paid within ten days after each month's gas bill has become due. Neither the articles of incorporation of the defendant nor the ordinance, under which it obtained its franchise from the city, specifies or indicates the manner or purpose for which natural gas was to be supplied to consumers of the city of Richmond, nor was any price fixed thereunder for which natural gas should be furnished to such consumers. The only place in the ordinance where the use of natural gas supplied by appellant is referred to is contained in sections one and nine of the ordinance as heretofore set out.

On the foregoing facts the court stated four conclusions of law, of which the fourth is as follows: "The rule promulgated by the defendant, on the 1st day of September, 1897, fixing the price of gas to consumers at twelve and one-half cents for 1,000 cubic feet, when used for fuel purposes only, and when used by consumers for both fuel and illuminating purposes, at twenty cents per 1,000 cubic feet

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for both purposes, unjustly discriminates against those consumers who use such gas for both purposes, as far as the use of such gas for fuel purposes is concerned, and can not be enforced against them in their use of such gas for such purpose."

This last conclusion of law is the one of which appellant more especially complains. The principal contentions of its counsel are: (1) That the complaint is not sufficient on demurrer; (2) that the special finding of facts does not warrant the fourth conclusion; (3) that the evidence does not sustain the finding.

It is insisted that appellant had the lawful right, as it did, to divide its domestic consumers into two classes by the rule adopted and published under the notice given, such classification including (1) those who used gas under the meter system for fuel only, (2) those who consumed it under the same system for both heating and illuminating purposes. It is contended that appellant had the right to exact from the latter class a greater price or rate per 1,000 cubic feet, for the gas consumed for such purposes, than was charged to and paid by consumers constituting the first class. Such a classification, it is contended, under the circumstances in this case, is not an unjust or unlawful discrimination upon the part of appellant in fixing the price to be charged for the gas which it furnished, for the reason that the classification in question applied alike, under similar circumstances or conditions, to all of the consumers of appellant's gas.

On the part of counsel for appellee it is insisted: (1) That the company was required to furnish natural gas to consumers not only for fuel but also, if desired by them, for illuminating purposes. (2) That a discrimination, under the rule adopted, whereby one domestic consumer was charged twelve and one-half cents per 1,000 cubic feet for gas used for fuel only, and another was charged twenty cents for the same amount, solely because he consumed an

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additional quantity for light, is an arbitrary, and unlawful discrimination.

The rule of the common law so universally recognized and enforced declares that persons, either artificial or natural, engaged in conducting a business which is public in its character or nature or which is impressed with a public interest, can not arbitrarily select their patrons, but must serve impartially or on equal terms and at reasonable rates all who apply for service. It is true that this rule can not be interpreted as requiring absolute uniformity of rates or prices nor as prohibiting, under any and all circumstances, a discrimination by performing services for one person at a price or rate lower than that exacted of others. This doctrine is more frequently enforced in respect to railroad companies and other common carriers, and while the latter can not arbitrarily select their patrons, still they are not prohibited from undertaking the transportation of wares or goods of one patron at an unreasonably low rate or from conferring upon him other practical advantages in respect to such transportation not extended to his competitors or to the public in general.

It is disclosed that the ordinance adopted by the common council of the city of Richmond granted to appellant the right to lay its pipes and mains under the streets, alleys, and thoroughfares of that city "*for the supply of natural gas to said city and the citizens thereof.*" (Our italics.) Appellant is in its nature a public corporation and the business which it was organized to carry on, by virtue of the statutes by which it was created, is impressed with a public interest, which fact was recognized by the legislature when it conferred upon it, and other companies of like character, the right of eminent domain. Acts 1889, p. 22, §5103 Burns 1894. It is the creature of the law, and the rights and privileges conferred upon it by the State, in theory at least, were granted not only for its own private benefit, but also for the benefit and good of the public, and in accept-

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ing them it impliedly, at least, agreed to carry out the purposes or objects of its creation, and assumed a duty or obligation towards the public which it will, under the law, be required to discharge. *State, ex rel., v. Portland Natural Gas Co.*, 153 Ind. 483. The duty which corporations like appellant owe to the public has been repeatedly stated and declared by the decisions of this court. *Portland Natural Gas, etc., Co. v. State*, 135 Ind. 54, 21 L. R. A. 639; *Westfield Gas, etc., Co. v. Mendenhall*, 142 Ind. 538; *Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 36 L. R. A. 535; *City of Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575, 15 L. R. A. 321; *Central Union Tel. Co. v. Bradbury*, 106 Ind. 1; *Central Union Tel. Co. v. Falley*, 118 Ind. 194; *State v. Portland Natural Gas Co.*, 153 Ind. 483.

In the case last cited the appellee therein had been granted the right or privilege by the city of Portland to lay its pipes and mains under the public streets of that city for the purpose of supplying the inhabitants thereof with natural gas for light and fuel. In considering, in that appeal, the duty of a gas company to the public, we said: "Its duty towards the citizens of the city of Portland and their duty towards it may be said to be somewhat reciprocal, and any dealings, rules or regulations between it and them, which do not secure the just rights of both parties, can not receive the approbation of a court. The law, among other things, exacted of appellee the duty to offer and supply gas impartially so far as it had the ability or capacity to do so, to all persons desiring its use within the territory to which its business was confined, provided always such persons made the necessary arrangements to receive it and complied with the company's reasonable regulations and conditions." (Citing authorities.)

Counsel for appellant seemingly contend (1) that it is not shown that natural gas for illuminating purposes is of less value than the same is for fuel, or that such gas, when used for both light and fuel, is not reasonably worth twenty

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cents per 1,000 cubic feet, and, hence, it is asserted, that it does not appear that appellant, under this rule, has unjustly or injuriously discriminated against appellee; (2) that it is not disclosed how many feet of gas he consumed for fuel and how much for light, consequently, it is insisted, that it can not be claimed that there has been any discrimination so far as he is concerned. These contentions, in our opinion, are not impressed with merit. Counsel for appellee concedes, and properly so we think, that companies engaged in furnishing gas and water, etc., to the public may make classifications in respect to their patrons or customers and adopt reasonable rules and regulations for the control of such classes, but that the classification must be reasonable and impartial, and not arbitrary or of an unjust, discriminating character but that due regard must be had to the rights of the citizens of the town or city depending upon such companies for their supply of water or gas, as the case may be, and that all occupying similar or like positions must be treated impartially. *Portland Natural Gas Co. v. State*, 135 Ind. 54; *Coy v. Indianapolis Gas Co.*, 146 Ind. 655; *State v. Portland Natural Gas Co.*, 153 Ind. 483, and cases cited; *Haugen v. Albina Light, etc., Co.*, 21 Ore. 411, 28 Pac. 244; *Shepard v. Milwaukee Gas Light Co.*, 6 Wis. 526; *Young v. City of Boston*, 104 Mass. 95. See cases collected in note to *City of Rushville v. Rushville Natural Gas Co.* (132 Ind. 575), in 15 L. R. A. 321.

Appellant, during the nine years of its operation and prior to the adoption of the rule in dispute, seems to have recognized but two classes of consumers, namely, manufacturers and domestic. To the latter class appellee belonged. For a period of about four years and over, he, along with other consumers, used appellant's gas both for fuel and light, the amount so consumed for such purposes being ascertained by means of meters. Of this fact appellant had full knowledge and accepted pay for the gas so consumed at the rate of twelve and one-half cents per 1,000 cubic feet.

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In 1897, as shown, it adopted the rule in question requiring its patrons who used gas for both fuel and light to pay the increased price of twenty cents per 1,000 feet. The rate or price as to all others who used gas for fuel only remained, as previously fixed, at twelve and one-half cents per 1,000 feet. Under this rule appellant did not profess to have any regard or consideration for the amount consumed for light. If any patron, using gas for heating his dwelling, also employed one jet about his dwelling whereby a small amount of natural gas was consumed each month for light, he was amenable and subject to the rule in like manner as the fuel consumer would be who used many jets about his premises for illuminating purposes. The amount consumed for light does not seem to be a feature of any importance within the meaning of the rule in question. Such a regulation, under the facts in this case, when tested by the principle affirmed and sustained by the authorities, must certainly be held unreasonable, arbitrary and unjust. That this is so is evident we think without further comment.

Counsel for appellant refer us to *Philadelphia Co. v. Park & Brothers*, 138 Pa. St. 346, 22 Atl. 86. The holding in that appeal, however, lends no support to their contention upon the question here involved. The rule there affirmed was to the effect that a manufacturing company supplied by a gas company with natural gas under a contract that it was to be used for fuel only, by using gas from the gas mains for illuminating purposes, will be held liable to pay, for gas consumed for such latter purpose, the reasonable value thereof at the usual market price.

The special finding in the case at bar is in harmony with and supports the complaint and warrants the fourth conclusion of law, and the evidence sustains the finding. Under the facts appellee established a case which entitled him to the equitable relief demanded and secured by the judgment of the lower court. None of appellant's assignments of error is sustained, and the judgment is therefore affirmed.

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155 671
100 589

TAYLOR ET AL. v. CANADAY, RECEIVER.

[No. 18,704. Filed June 6, 1900. Rehearing denied Jan. 2, 1901.]

RECEIVERS.—Authority to Sue.—Complaint.—In an action by a receiver to enjoin the collection of certain promissory notes, the complaint alleged that plaintiff was appointed receiver in the court where the suit was brought, in an action within the court's jurisdiction, and that in the order of his appointment was commanded to reduce to his possession all the property, rights, credits, and choses in action, and as such receiver to prosecute in his own name all actions necessary in the discharge of his duties. *Held*, that the complaint exhibited sufficient authority in the receiver to bring the suit. p. 674.

TRIAL.—Special Finding.—A special finding, "that the said bank was insolvent, and had done and committed acts of insolvency," is not bad, as stating a conclusion of law. p. 675.

APPEAL.—Conclusions of Law.—Joint Exception.—A joint exception to more than one conclusion of law is not available on appeal if any one of the conclusions is correct. pp. 676, 677.

SAME.—Bill of Exceptions.—Time Given for Filing Beyond Term.—Exceptions to the ruling of the trial court, to be available on appeal, should have been reduced to writing and filed within the limits of that term, unless the time for filing was extended beyond that term by special leave of court, which fact must affirmatively appear from the record. p. 677.

SAME.—Terms of Circuit Court.—Judicial Notice.—The Supreme Court takes judicial notice of the terms of circuit courts. p. 678.

SAME.—Bill of Exceptions.—When Not Filed Within Time Granted by Court.—Where leave was granted by the court to file a bill of exceptions within ninety days and beyond the term, a bill is no part of the record unless filed within the time granted. p. 678.

From the Randolph Circuit Court. *Affirmed.*

Theo. Shockney, John Shockney, J. S. Engle, J. J. Cheney, J. W. Macy, J. P. Goodrich, W. G. Parry and E. L. Watson, for appellants.

W. A. Thompson, for appellee.

HADLEY, J.—This action is to enjoin the collection of certain promissory notes assigned by the Citizens Bank of Union City, to appellant Taylor, treasurer of Union City,

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in alleged violation of §2934 Burns 1894. Trial, finding and judgment for the plaintiff. Separate assignments of error call in question the sufficiency of the complaint, the correctness of the conclusions of law, and the action of the court in overruling appellant's several motions for *venire de novo* and for a new trial.

The special finding discloses the following facts: The Citizens Bank of Union City was legally organized March 27, 1893, under the provisions of an act of the General Assembly approved February 7, 1873 (Acts 1873, p. 21), as a bank of discount and deposit, and did business as a bank of discount and deposit from the date of its organization to the 6th day of May, 1896, when its doors were closed, and the appellee was thereafter duly appointed and qualified as receiver and took charge of its assets for administration. On January 2, 1895, appellant Taylor was by the city council appointed treasurer of Union City to succeed Rosser, resigned, and, in settlement with Rosser, Taylor accepted a check drawn upon the Citizens Bank of Union City for the full amount due the city from the retiring treasurer. This check Taylor deposited with the Citizens Bank and opened with the bank a general account in the name of P. A. Taylor, treasurer, and, from time to time up to and including May 1, 1896, deposited with the bank and had placed to his said account all the money that came to his hands as treasurer of the city, amounting in all to \$41,610.57, and against which deposits he from time to time during all of said period drew checks in discharge of the liabilities of the city, and which were paid upon presentation, amounting in all to \$32,184.95. The officers and directors of the bank were sureties upon Taylor's official bond, and had knowledge that the money Taylor so deposited with the bank was not his individual money, but money belonging to the city of Union City. All the money so deposited by Taylor was intended by him and received by the bank as general deposits subject to check, and was

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mingled by the bank with its own funds and with the moneys of other general depositors and used by the bank as its own money. Taylor at no time loaned any part of the moneys so deposited by him to the bank, or other party. On May 2, 1896, there was owing Taylor from the bank a balance of \$8,416.36, which he was entitled to draw, and on that day Taylor drew and presented his check on the bank for the full amount of the city's balance; the bank paid no money on the check, but, in lieu thereof, Cadwallader, as president, and on behalf of the bank, turned over and assigned to Taylor promissory notes and bills receivable, after the same had been indorsed on behalf of the bank by Edger, cashier, amounting in the aggregate to \$8,426.18, which notes were assigned by the bank and accepted by Taylor in full settlement of said balance due himself and the city, and to secure and make Taylor and the city safe on account of said deposits and on account of the indebtedness of the bank to Taylor as a depositor.

Taylor submitted said notes to one McMahan, who was at the time a member of the city council and chairman of the finance committee, and also a director of the bank, for examination, and afterwards, on May 4th, Taylor returned all of the notes to the bank but one, and received from the bank other notes of the bank indorsed as in the first instance in lieu thereof sufficient to cover said balance less \$1,000 cash then paid on account of said balance. At the time of this last transaction it was agreed between the bank by Cadwallader, president, and Taylor that Taylor should continue to draw his checks upon the bank for the current liabilities of the city and that such checks should be paid, and as fast as the checks thus paid should equal a note or notes so assigned Taylor should return such note or notes to the bank. The indorsement and transfer of said notes and bills by said bank to Taylor was accepted by Taylor and made by the bank for the purpose of giving Taylor, as treas-

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urer of Union City, a preference over the other creditors of the bank. Before any of said notes had been assigned to Taylor said Citizens Bank was insolvent and had committed acts of insolvency, which insolvency and acts of insolvency were well known to the officers of said bank before the transfer of said notes, and before said transfer Taylor had good reason to believe and did believe said bank was insolvent.

It is insisted that the complaint does not sufficiently exhibit authority in the receiver to bring this suit. It is alleged in the complaint that appellee was duly and legally appointed by the Randolph Circuit Court receiver of the Citizens Bank, in an action within the court's jurisdiction, and in the order of his appointment said receiver was commanded to reduce to his possession all the property, rights, credits, and choses in action of every description, and as such receiver "to bring, maintain, and prosecute, in his own individual name any and all actions necessary in the discharge of his duties as such receiver, whenever in the judgment of said receiver it might be necessary to bring and prosecute any such suit, in the proper discharge of his duties." This action is also brought by the receiver in the court of his appointment.

While it is essential to the sufficiency of the complaint that it appear by clear and express averment that the receiver was authorized by the court to bring the action, we think the averments before us are sufficient. *Hatfield v. Cummings*, 152 Ind. 280; *Davis v. Talbut*, 128 Ind. 222; *High on Receivers*, §201.

It is not necessary that the complaint shall show that the receiver had specific authority from the court to bring this particular action; it is good if it is shown that in the order of appointment authority to sue was sufficiently broad to authorize the receiver to institute and prosecute such suits as become necessary and proper for the collection of the assets and for obtaining possession of the property over which he has charge. The complaint in this respect is sufficient. *Beach on Receivers*, §651.

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It is also urged that the complaint is insufficient to state a cause of action against either of the appellants. The complaint avers substantially the same facts stated in the special finding, and we deem it sufficient.

It is also contended by both appellants that the special finding is bad because it states conclusions and not ultimate facts, the chief complaint being made of finding thirty-five, wherein it is stated "that the said Citizens Bank was insolvent and had done and committed acts of insolvency" before its assignment of the notes to appellant Taylor. It is affirmed that "nowhere in the special finding does the court assert any fact upon which the court could be warranted in the conclusion that the bank was insolvent" and again, "What act of said bank, as shown by the special finding of facts, * * * discloses that the bank ever committed an act of insolvency?"

The office of a special finding is not to state the evidentiary facts, that is, such facts as *prove* the existence of the ultimate or inferential facts. Such evidentiary and probative facts are to be considered by the court in determining the existence of the substantive ultimate facts, but their statement in a special finding is improper.

The validity of a special finding and of a special verdict is to be tested by the same rules. It is said in *Locke v. Merchants Nat. Bank*, 66 Ind. 353, at page 362: "It has often been decided by this court that the jury should not find the evidence, but the facts; by which is meant the inferential facts"; and it is further said in *Louisville, etc., R. Co. v. Miller*, 141 Ind. 533, at page 550: "An inferential fact is an inference or conclusion from the evidentiary facts; it is an inference or conclusion from evidence. This being true, such conclusions are not conclusions of law, but they are inferences or conclusions of fact. It is, therefore, not necessary to set out or return the evidence from which the jury draw or infer such facts. Such inferences or conclusions, being matters of fact purely, and as the

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jury are the exclusive judges of the facts they alone can determine what are the proper and legitimate inferences or conclusions to be drawn from the evidentiary facts."

Whether the bank was solvent or insolvent and had or had not committed acts of insolvency, at the particular time the notes were transferred, were material inquiries and ultimate facts to be deduced from the evidence as facts, not as conclusions of law.

In *Bartholomew v. Pierson*, 112 Ind. 430, the special finding disclosed that a married woman executed a note and mortgage "in order that her husband might obtain the money, which he did receive upon the check, and not for the purpose of obtaining any money for herself." This finding was held insufficient for failure to find "the ultimate fact, as a fact, that appellee [the wife] executed the note and mortgage as *surety for her husband* only."

The finding that a delivery of money to a child "was an advancement" is the finding of a fact, and the circumstances of the delivery are but evidence, and improperly incorporated into the finding. *Whitcomb v. Smith*, 123 Ind. 329. See, also, *Relender v. State*, 149 Ind. 283. "Executed the deed" is an ultimate fact, and the details are out of place in a special finding. *Smith v. James*, 131 Ind. 131. "The levy continued in force" for a specified time. "The levy" and "continued in force" are inferential facts, and not conclusions of law. *Scanlin v. Stewart*, 138 Ind. 574.

Further objections of like character are suggested to other findings, but, so far as they properly arise under a motion for a *venire de novo* and are material to any issue in the case, we deem them insufficient.

There are eight separate conclusions of law to the special finding. The exception reserved thereto is as follows: "To which finding and conclusions of law the defendants and each of said defendants separately and severally excepted." This exception is several as to the appellants but joint as to the conclusions. A joint exception to more than one con-

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clusion must fail if any one is correct. *Saunders v. Montgomery*, 143 Ind. 185; *Earhart v. Farmers Creamery*, 148 Ind. 79; *Hatfield v. Cummings*, 152 Ind. 537.

There is no contention over at least one of the conclusions, and this leaves no question for consideration under the second assignment of error. Appellants separately assign numerous reasons for a new trial, calling in question the sufficiency of the evidence to support the special finding as a whole and divers specific findings.

Appellee confronts this assignment of error with the proposition that the evidence is not properly in the record. The original record and return to *certiorari* shows that the cause was put at issue and the special finding and conclusions of law were filed on the 13th day of February, the same being the thirty-sixth judicial day of the January term, 1897. On the 1st day of March, the same being the first judicial day of the March term, 1897, appellants filed separate motions and reasons for a new trial, and on the 20th day of July, the same being the one hundred twenty-second judicial day of the March term, 1897, appellants' motions for a new trial were overruled, and final judgment entered upon the special finding and conclusions of law. Exceptions were reserved to the overruling of the motions for a new trial, but no time was requested or given by the court in which to file a bill of exceptions. It further appears that October 19, 1897, what purports to be a bill of exceptions was signed by the judge and on the same day filed in the clerk's office.

The ruling upon the motions for a new trial and final judgment upon the issues were made upon the same day and recorded in the same entry on the one hundred twenty-second judicial day of the March term, 1897, and under the statute, §638 Burns 1894, §626 Horner 1897, and decisions of this court, all exceptions reserved, to be available on appeal, should have been reduced to writing and filed within the limits of that term unless the time for filing was

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extended beyond that term by special leave of court, which fact must affirmatively appear from the record. *Hancher v. Stephenson*, 147 Ind. 498; *Minnick v. State*, 154 Ind. 379; Ewbank's Manual §33; Elliott's App. Proc. §804.

This court will take notice that the 19th day of October, 1897, the day upon which the bill of exceptions was filed, occurred, not within the limits of the March, but of the September term, 1897, and the record nowhere disclosing any leave of court to file such bill at a time subsequent to the March term, it must be held as forming no part of the record and as presenting no question in this appeal.

We find no available error in the record. Judgment affirmed.

Monks, J., did not participate in this decision.

PETITION FOR REHEARING.

PER CURIAM.—Appellants in their petition for a rehearing earnestly complain of our ruling that the bill of exceptions was not in the record. The ruling was placed upon the ground that the bill was filed at a time subsequent to the adjournment of the term at which the final judgment was rendered, without special leave of court extending the time for filing beyond the term. Upon reviewing the return to the writ of *certiorari* we find that leave was granted to one of the appellants, the city of Union City, to file its bill of exceptions within ninety days. The record shows that such leave was granted July 20, 1897, and that the bill was filed October 19, 1897, which filing was not within the time granted, and the bill therefore was no part of the record. Petition overruled.

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NUMBER FOUR FIDELITY BUILDING AND SAVINGS UNION
v. SMITH.

155	679
f170	671
f170	672

[No. 19,346. Filed Oct. 4, 1900. Rehearing denied Jan. 11, 1901.]

BUILDING AND LOAN ASSOCIATIONS.—Liquidation.—Payment of Instalments After Association goes into Liquidation.—Rights of Borrowing Members.—Where a building and loan association abandons the objects for which it was organized by going into voluntary liquidation, it thereby releases its borrowing members from their obligations to continue the stipulated monthly payments under the contract, and where a member continued her monthly payments after the association had gone into liquidation she was entitled to have the whole amount of the instalments paid by her after the association went into liquidation, including the sum paid as dues, applied on her debt.

From the Hamilton Circuit Court. *Affirmed.*

R. W. McBride and *C. S. Denny*, for appellant.

S. M. Unger, for appellee.

DOWLING, J.—The appellant was a building and loan association organized under the laws of this State. In May, 1899, in pursuance of a resolution of its board of directors, it went into liquidation, agreeably to the provisions of the act of February 22, 1899. Acts 1899, p. 84.

The appellee was a borrowing member, and had regularly paid all instalments of dues, interest, and premium up to and including the instalments due in April, 1899. She also made full payments of interest, premium, and dues in May, June, July, August, and September, 1899, after the association had gone into liquidation, but made them under protest. She claimed that by going into voluntary liquidation, the association had abandoned the objects for which it was organized, that she was thereby discharged from her contract to pay her debt in monthly instalments of interest and premium, and that she had become entitled to discharge the balance due in a single payment. She further asserted that the several sums previously paid by her, on

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account of interest and premium, should be treated as partial payments on her debt. She tendered the amount of the loan, with interest at six per cent. per annum to the date of such tender, after making such deductions on account of the premium and interest paid, and demanded the surrender of her note and the cancelation of her mortgage. Her offer being refused, she brought this suit to quiet her title to the premises mortgaged by her to secure the payment of said loan, the amount admitted to be due upon the note and tendered to the appellant being paid into court. There was a special finding of the facts, and the conclusions of law stated by the court were favorable to the appellee. These conclusions are assigned for error, and the only question is whether the rule adopted was the correct one.

This court has held that where a building and loan association becomes insolvent and passes into the hands of a receiver, its incapacity to perform its part of the contract between it and a borrowing member relieves the member from his obligation to continue the stipulated monthly payments under the agreement. Whatever the member has to pay is to be paid at once, and in a single sum. The amount is to be determined, not from the abrogated contract, but from the equitable principle of adjusting the losses with equality among the stockholders. It has also been held that in such cases the borrowing member should be charged with the amount of the loan, and interest thereon at six per cent. per annum, and that he should be credited with the several sums paid on account of interest and premium as partial payments upon the money had and received, leaving nothing but the stock payments to be subjected to losses and expenses. *Marion Trust Co. v. Trustees Edwards Lodge, etc.*, 153 Ind. 96; *Security Savings Assn. v. Elbert*, 153 Ind. 198; *Huter v. Union Trust Co.*, 153 Ind. 204.

It is said in *Marion Trust Co. v. Trustees Edwards Lodge, supra*, that "The contract between the parties was that appellee should pay stated sums monthly, (1) for dues

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upon stock, (2) for interest on the loan, and (3) for premium for the loan, and that the association, in consideration of these payments, should never call upon appellant to repay the loan in lump, but that the mortgage should be released when the payments on the stock together with appellee's proportionate share of the association's profits from interest, premiums, and fines, should make the real value of the stock equal its face value." Such associations impliedly agree with their members that they will continue in business until the stock issued by them has matured according to the general plan upon which such associations are organized. In estimating the value of the stock as an investment on the one hand, and the probable expense of the loan on the other, the borrowing member has the right to consider and rely upon the probable accumulations and profits to arise from a continuation of the series until his stock has matured according to the terms of the agreement, and the charter of the corporation. The consequences of a winding up of a solvent association by a voluntary liquidation are quite as fatal to the expected advantages of the investment and loan as if the business of the corporation were brought to a standstill by insolvency. A loss of a proportionate share of the prospective profits by the borrowing member is the necessary result of a final suspension of the business of the association. By going into voluntary liquidation, the corporation abandons the objects for which it was organized, and the effect of such abandonment is to release its borrowing members from their obligations to continue the stipulated monthly payments under the contract. *Cook v. Kent*, 105 Mass. 246; *Waverly, etc., Assn. v. Buck*, 64 Md. 338, 1 Atl. 561; Endlich on Law of B. and Loan Assns. (2nd ed.) §523.

In such cases the obligation to pay dues on the stock ceases altogether. Endlich on Law of B. & Loan Assns. (2nd ed.) §523; *Low Street Bldg. Assn. v. Zucker*, 48 Md. 448.

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The appellee, therefore, was entitled to have the whole amount of the instalments paid by her after the corporation went into liquidation, including the sum paid as dues, applied on her debt.

The appellant contends that when a member becomes a borrower, the association performs its contract to him as a member by anticipating the maturity of his stock, and that if the loan is of the full par value of the stock it operates as a complete performance by the association. This, however, is not the view the courts have taken of the scope and legal effect of the agreement between the borrowing member and the corporation. It is said that, "in consideration of these undertakings on his part [the borrower] is entitled to the privileges of a member, the principal of which is the right to share in the final distribution of the fund accumulated by the corporation from the payments made by himself and other members." *Cook v. Kent*, 105 Mass. 246.

No question as to the constitutionality of the act of February 22, 1899 (Acts 1899, p. 84), is involved in this case. It is unnecessary to decide whether the effect of voluntary liquidation like that of insolvency is to make the unpaid balance of the loan presently due and payable. The appellee voluntarily offered to pay the whole of her debt at once, and she makes no objection to the winding up and dissolution of the corporation under this statute.

We find no error in the record. Judgment affirmed.

BALDWIN v. HEIL ET AL.

[No. 18,918. Filed Oct. 10, 1900. Rehearing denied Jan. 24, 1901.]

APPEAL AND ERROR.—*Special Finding.*—*Conclusions of Law.*—A conclusion of law erroneously included in the special finding of facts will be disregarded on appeal. p. 684.

SAME.—*Special Finding.*—*Assignment of Error.*—A specification of error that a conclusion of law was erroneously included in the special finding of facts presents no question for review. p. 684.

155	682
156	85
156	86
155	682
160	539

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APPEAL AND ERROR.—*Special Finding.—Assignment of Errors.*—

Where an objectionable statement not warranted by the evidence is included in the special finding of facts, the objection thereto should be first presented by a motion for a new trial. *p. 684.*

SPECIAL FINDING.—*Conclusion of Law.*—The insertion in the special finding of facts by the trial court in an action on a note that the amount due, including interest and attorney's fees, was \$500, was not objectionable as a conclusion of law included in the finding of facts, since such statement was a finding of fact, and not a conclusion of law. *p. 684.*

APPEAL AND ERROR.—*Conclusions of Law.—Joint Exception.*—Where the exception to the conclusions of law is made jointly, if any one of them is correct the exception must fail as to all. *pp. 684, 685.*

HUSBAND AND WIFE.—*Inchoate Interest of Wife.—Deeds —Consideration.*—The surrender by a wife of her inchoate interest in the lands of her husband constitutes a valuable consideration for the conveyance to her of other property by way of compensation for the interest so surrendered and conveyed by her. *p. 690.*

SAME.—*Conveyance to Wife in Lieu of her Inchoate Interest.—Fraudulent Conveyances.*—A conveyance of real estate to a wife in exchange for real estate owned by her husband, made in lieu of her inchoate interest therein, will not be set aside, at the instance of creditors, as fraudulent, where it was shown that the land owned by the husband was worth \$9,820, subject to a mortgage debt of \$4,500, and the property conveyed to the wife was of the value of \$2,400. *p. 691.*

From the Newton Circuit Court. *Affirmed.*

William Cummings, William Darroch and D. P. Baldwin, for appellant.

F. A. Comparet, Frank Foltz, C. G. Spitler and H. R. Kurrie, for appellees.

DOWLING, J.—Action by appellant upon two promissory notes executed by appellee Daniel Heil, and to set aside as fraudulent a conveyance of land made to the wife of said appellee. Trial by the court; special finding of facts, with conclusions of law thereon; and, after divers motions by appellant, judgment against Daniel Heil on one of the notes, and in favor of Elizabeth Heil upon the issue as to the liability of the land to the judgment recovered by the appellant. No question upon the pleadings is presented. The

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object of the various motions of appellant was to increase the amount of his judgment, and to have the land held by Elizabeth Heil, or some part of it, subjected to the payment of appellant's claim. These motions were overruled. On the return of the special finding, the appellant excepted "to the conclusions of facts and law as rendered by the court." A motion for a new trial was made by appellant, but the ruling of the court on that motion is not assigned for error.

The first error attempted to be assigned is in these words: "The court below erred in inserting in its first conclusion of fact, the following conclusion of law, viz.: 'that the amount due Baldwin at that time, with ten per cent. interest and attorney's fees was \$500.' " This specification of error presents no question for review. If a conclusion of law is erroneously included in a special finding of facts, it will be disregarded on appeal. *Old Nat. Bank v. Heckman*, 148 Ind. 490, 512; *Craig v. Bennett*, 146 Ind. 574; *Stalcup v. Dixon*, 136 Ind. 9.

But if the objectionable statement is really a conclusion of fact not warranted by the evidence, the objection thereto should be first presented by a motion for a new trial. Matters which constitute grounds or reasons for a new trial, as a general rule, cannot be independently assigned as error. *Tarkington v. Purvis*, 128 Ind. 182, 9 L. R. A. 607; *Elliott's App. Proc.* §347; *Ewbank's Manual*, §134.

The finding complained of must be regarded as a finding of fact, and not a conclusion of law. The balance due on the notes at a given date was a fact depending upon the original amount of the notes, the rate of interest, and the sum of the payments. Whether the appellee, Daniel Heil, was liable to pay the amount found due was a conclusion of law. *Braden, Adm., v. Lemmon*, 127 Ind. 9; *Biddle v. Pierce*, 13 Ind. App. 239.

The *second, third, fourth, and fifth* errors assigned call in question the correctness of the four conclusions of law upon the special finding of facts. The exception to these

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conclusions was taken in gross, so that the conclusions cannot be assailed in detail. If any one of them is correct, the exception must fail as to all. We are of the opinion, however, that all the conclusions were correct.

The facts found by the court were as follows: August 29, 1876, Daniel Heil and Henry Bartlett executed to the appellant a note for \$73.75, due in sixty days, bearing interest at the rate of ten per cent., and providing for the payment of attorney's fees; January 30, 1877, the same parties executed to the appellant another note for \$200, bearing interest at the rate of ten per cent., and containing an agreement for the payment of attorney's fees; in February, 1887, Bartlett having before that died insolvent, appellant threatened to sue Heil, and put the two notes in the hands of an attorney for collection; Heil thereupon executed to appellant, in settlement of his claim, three notes, amounting together to \$600, payable at one, two, and three years, bearing eight per cent. interest; at the time these three notes for \$600 were given to appellant, the true amount due to him on account of the original notes, including interest and attorney's fees, was \$500 only; Heil, thereafter, that is, from February, 1887, paid to the appellant interest at the rate of eight per cent. on \$600, the face of said three notes, until February 15, 1896; at the date last named Heil took up the three notes, and executed to the appellant the note for \$600 described in the complaint. Heil paid the interest on this note at the rate of eight per cent. up to March 12, 1897. He afterwards executed to appellant the note for \$50, set out in the complaint, in consideration of the unpaid interest on the \$600 note, and the grant of additional time to pay the same; the two notes have never been paid, excepting \$48 per year thereon for the period of eight years; the sum of \$65 is a reasonable attorney's fee for collecting the notes sued on; in October, 1897, the appellee Daniel Heil owned 233 acres of land in Cass county, Indiana, subject to a mortgage for \$4,500,

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executed by him and his wife, and co-appellee, Elizabeth Heil, to the Aetna Life Insurance Company, bearing date about December 25, 1896; one Charles D. Wilson, being the owner of the two pieces of real estate in Kentland, Indiana, described in the complaint, an exchange of property was agreed upon between him and Daniel Heil; in the exchange, Heil's land in Cass county was valued by both parties at \$44 per acre, but its real value, as shown by the proof, was \$40 per acre, or \$9,320; the Kentland property was, likewise, valued at \$4,750, but its real value was \$2,400, and no more; Wilson agreed to assume the payment of the mortgage debt of \$4,500, and the accrued interest, on the Cass county land, and, after deducting the amount thereof from its agreed value of \$44 per acre, he was to pay the difference, about \$1,000, to Heil in money; at the time of this transaction, the appellee Daniel Heil owed \$3,500 in addition to the \$4,500 due upon the mortgage debt, and he had not then, nor did he at any time afterwards, have sufficient property, real or personal, to pay his debts; at the time of the commencement of this suit he had no property in his own name subject to execution; when the exchange of property took place, the appellees, Heil and wife, caused the deed of conveyance for the Kentland real estate to be made by Wilson to the appellee Elizabeth Heil, to avoid the payment of a claim of \$4 per acre, held by one Winslow for his services in effecting the exchange of said lands, and to protect the appellee Elizabeth Heil in the enjoyment of the Kentland property; the appellee Elizabeth Heil had two children by her co-appellee, Daniel Heil; she received the conveyance of the Kentland real estate for the purpose of defeating the claim of Winslow, to secure her rights as the wife of her co-appellee, and to save it from the creditors of her husband; at the time the appellee Elizabeth Heil received the deed for the Kentland property, she released her inchoate rights as the wife of Daniel Heil in the Cass county land; the value of the Cass county land

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was \$40 per acre; the value of the Kentland property was \$2,400, one parcel thereof, called the dairy, being worth \$1,200, and the other, called the store, \$1,200; after the exchange of the Cass county lands for the Kentland property the appellee Daniel Heil owned personal property of the value of about \$2,000; at the request of her husband, Elizabeth Heil executed a deed for the property in Kentland, called the store, to one Peter Heil to secure an alleged debt of her husband but the deed was void because Daniel Heil did not join in it; after the exchange of lands with Wilson, Daniel Heil mortgaged all of his personal property to his brother to secure a pretended debt of \$1,500, for the purpose of hindering and delaying his, Daniel Heil's, creditors.

Upon the foregoing facts, the court stated the following conclusions of law:

“(1) That Daniel Heil is indebted to the plaintiff, Daniel P. Baldwin, in the sum of \$380, without relief from valuation or appraisement laws, and that a reasonable fee to collect the same is \$65, for which total sum of \$445 he is entitled to a judgment without relief from valuation or appraisement laws; (2) that the \$50 note, being given for interest, and merged in the judgment, there is no necessity for reforming the same; (3) that the conveyance of the Kentland real estate to Elizabeth Heil, to wit, the south twenty-one feet of lots one, two, and three, in block thirteen, of the original plat of the town of Kentland, and out lot twenty-three, in McCulloch's addition to the town of Kentland, was made in good faith by Wilson and wife to Elizabeth Heil, and received by her with the intent to secure herself in her right as wife. That Daniel Heil caused said deed to be executed and received by Elizabeth Heil to prevent his creditors from recovering two-thirds of the same from his wife; (4) that judgment for the costs go against the defendant, Daniel Heil, and in favor of the defendant, Elizabeth Heil.”

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Among the defenses set up by the appellee Daniel Heil were want of consideration, and usury. As the court found that in February, 1887, when the three notes amounting to \$600 were executed, only \$500 was due, and that eight per cent. was charged and paid on this fictitious basis for eight years; and as it further found that the fictitious principal of \$600 was carried forward into the note executed February 15, 1896, and interest for one year at eight per cent. was charged and paid on it, the defense of usury was made out, and the appellant was entitled to receive interest at the rate of six per cent. only, calculated upon a principal of \$500, and subject, each year, for nine years, to a credit of \$48. The amount really due the appellant, on account of principal and interest at the time of the trial, was \$341.84, to which the attorney's fee of \$65 is to be added, making a total of \$406.84. The amount found to be due and allowed by the court to the appellant was \$445 or \$38.16 in excess of the correct sum.

No question is raised by the appellant as to the correctness of the *second* conclusion of law, but an attempt is made to avoid the consequences of the admission by the suggestion that the conclusion was immaterial. The complaint, unnecessarily, sought the reformation of the note referred to in the second conclusion in a particular which was unimportant, and the conclusion of the court that such reformation was unnecessary was proper. We are not prepared to say that where there are several conclusions of law, and an exception is taken to them in gross, the immateriality of one or more of the conclusions, if otherwise correctly stated, would relieve the party excepting from the consequences of his failure to except to each conclusion separately; but this question is not important in the present case, and we do not decide it.

The third conclusion involves the question of the validity of the conveyance by Wilson to Mrs. Heil of the Kentland lots. The law of this part of the case is very plain, and is

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very well settled. As the wife of her co-appellee, Daniel Heil, she had an inchoate interest in the Cass county land of which her husband was seized. If she survived him, or, in case of a judicial sale of the lands where her interest was not directed by the judgment to be sold, or barred by virtue of the sale, her inchoate interest would become absolute, and vest in her. §§2640, 2669 Burns 1894, §§2483, 2508 R. S. 1881 and Horner 1897.

If the value of the real estate of her husband did not exceed \$10,000, then, either upon his death, or upon a judicial sale, she would take one-third in fee simple of all lands of which her husband was seized at any time during coverture, in the conveyance of which she did not join. While Mrs. Heil's interest in the lands was contingent, and uncertain, yet it was a valuable interest, and one of which she could not be divested without her consent. In the absence of fraud, she had the right to fix her own valuation upon it, and to stipulate, in the exchange of the real estate, that her interests should be protected by the conveyance to her of a part of the consideration upon which the Cass county lands were transferred to Wilson. Apparently, the transaction between Wilson and Daniel Heil was advantageous to the latter. Wilson assumed the payment of the mortgage debt of \$4,500, with interest, on the Cass county lands, and in addition to the transfer of the Kentland lots paid to Heil \$1,000 in money. The court found that the value of the Cass county lands was \$9,320, and the value of the Kentland lots \$2,400. The valuation put upon the respective parcels of real estate in the exchange, by the parties, was immaterial in a controversy between Mrs. Heil and a creditor of her husband. If it was important to measure the value of her interest in the lands, such measurement was properly made upon the basis of their real value, and not upon the fictitious and exaggerated estimate adopted by the parties. It is little short of absurd to say that in their dealings with, or relations to, strangers, the parties to an ex-

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change of real estate are bound by the nominal consideration set out in the deeds, or by the nominal values fixed upon the respective parcels of land for the purposes of the transaction.

The court found as a fact that Heil and his wife "caused the deed of the Kentland property to be made to the wife to avoid the payment of a claim of one Winslow for a commission of \$4 per acre, claimed by him for making the exchange, and to protect the said Elizabeth in the enjoyment of the Kentland property against Daniel Heil's creditors, she having two children by him." The burden was upon the appellant to show that the conveyance of the Kentland property to Mrs. Heil was fraudulent, and that he was, or might be, damaged by it. On a voluntary sale or exchange of the Cass county lands, Daniel Heil being insolvent, the only means, or certainly the most natural means, by which the inchoate interest of Mrs. Heil in said lands could be protected was by the conveyance or delivery to her of a part of the consideration received for said lands. She had a legal right thus to secure herself against her husband's creditors. In no other way could her rights in the land be so easily and effectually protected. Had the Kentland lots been conveyed to Heil, his creditors could have subjected two-thirds of such real estate to sale, and his wife would have had little or nothing for her interest in the Cass county lands. That the inchoate interest of a wife in the lands of her husband, in the conveyance of which she is asked by him to join, constitutes a valuable consideration for the conveyance by him, or at his request, to her of other property by way of compensation for the interests so surrendered and conveyed by her, has been recognized by this court in many cases. *Sharts v. Holloway*, 150 Ind. 403; *Ohio, etc., Co. v. Bevis*, 18 Ind. App. 17; *Worth v. Patton*, 5 Ind. App. 272; *Merchant, etc., Assn. v. Scanlan*, 144 Ind. 11; *Marmon v. White*, 151 Ind. 445; *Isgrigg v. Pauley*, 148 Ind. 436.

We think, therefore, that the transfer of the Kentland lots to the appellee Elizabeth Heil cannot be successfully

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assailed on the ground of fraud perpetrated upon the appellant.

The third conclusion of law is correct for the further reason that the conveyance of the Kentland lots to the appellee Elizabeth Heil did not harm the appellant. Had no exchange of real estate taken place, and had Heil continued to own the Cass county lands, then, on a sale of the same on execution in favor of appellant, Mrs. Heil, as against him, would have been entitled to receive one-third of the proceeds of such sale, and the appellant would have been entitled to no part of such proceeds until after the payment of the one-third coming to the wife, and of all liens and encumbrances on the property prior to his own. *Marmon v. White*, 151 Ind. 445; *Clements v. Davis*, ante, 624.

Supposing that the lands sold for \$9,320 (the value found by the court), the amount of the mortgage debt, \$4,500 and interest, would have been first paid, and next, Mrs. Heil would have been entitled to receive \$3,106.66, or, \$706.66 more than the value of the Kentland lots, as stated in the finding.

As was said in *Marmon v. White*, 151 Ind. 445, 454, a case closely resembling the present one, "It follows, therefore, that, even if Rush White had conveyed said real estate with the fraudulent intent of cheating and defrauding his creditors, of which intent his wife had knowledge, and the special finding had so stated, appellant would not have been damaged thereby, and would not, therefore, have been entitled to any relief in this action. *Citizens Bank v. Bolen*, 121 Ind. 301, 306, 307, and cases cited; *Moss v. Jenkins*, 146 Ind. 589, 599."

The fourth conclusion of law, that the appellee Elizabeth Heil was entitled to judgment for costs was a necessary consequence of the preceding conclusions, and was correct.

What has been said fully disposes of all the points made and discussed in appellant's briefs. We find no error. Judgment affirmed.

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[No. 19,211. Filed June 26, 1900. Rehearing denied Jan. 29, 1901.]

APPEAL AND ERROR.—*Assignments of Error.*—*New Trial.*—Assignments of error which are causes for a new trial present no question for review unless first presented by motion for new trial. p. 693.

JUDICIAL NOTICE.—*Deputy Attorney-General.*—Courts will not take judicial notice of the official character of the deputies or assistants of the Attorney-General. p. 694.

CRIMINAL LAW.—*Embezzlement by Justice of the Peace.*—*Indictment.*—*Demand by Attorney-General.*—*Deputy.*—No question is presented by a motion to quash an indictment against a justice of the peace for failure to account for fines received by him because of an allegation therein that the demand was made by a person named who was Deputy Attorney-General, since the question as to whether the person named was Deputy Attorney-General was a question of fact to be established at the trial of the cause. p. 694.

SAME.—*Embezzlement by Justice of the Peace.*—*Fines.*—*Indictment.*—In an indictment against a justice of the peace for the embezzlement of fines collected by him, it is not necessary to negative the provision of the statute that the amount of fines collected by him did not exceed three times the amount he would be entitled to as mileage in making his report. pp. 695, 696.

APPEAL AND ERROR.—*Joint Assignment.*—*Instructions.*—A joint assignment of error in a motion for a new trial based upon the action of the court in giving a certain series of instructions, or refusing certain instructions, cannot prevail, unless all of the instructions given were erroneous, or all of those refused were correct. p. 696.

SAME.—*Misconduct of Jury.*—*Affidavits.*—*Record.*—No question is presented on appeal upon an assignment in a motion for a new trial as to the misconduct of a juror, where the affidavits filed in support thereof are not contained in the bill of exceptions. p. 696, 697.

OFFICERS.—*Deputies.*—*Attorney-General.*—*Prosecution of Justice of the Peace for Embezzlement.*—*Demand by Deputy Attorney-General.*—In a prosecution against a justice of the peace for the embezzlement of fines collected by him and demanded by a deputy of the the Attorney-General, defendant cannot question the right of the Attorney-General to have two deputies, since there is nothing in the law creating the office of Attorney-General and prescribing his duties which fixes the number of his deputies. pp. 697, 698.

EVIDENCE.—*Justices of the Peace.*—*Embezzlement.*—Where in a prosecution against a justice of the peace for the embezzlement of fines collected by him the court limited the investigation of the dockets

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161	293

155	692
163	114

155	692
164	204

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of the justice given in evidence from the time of last settlement until the date of the demand made by the Attorney-General, and counsel for State read a list of cases from the dockets showing fines assessed and paid in excess of the amount reported by such justice, the jury was warranted in considering such matter as evidence in the absence of any objection made at the time by defendant. pp. 698, 699.

JUSTICES OF THE PEACE.—Embezzlement.—Failure to Account for Fines Collected.—Where the Deputy Attorney-General examined the dockets of a justice of the peace and failed to ascertain the correct amount of fines collected because of false entries made by such justice, such justice was as much guilty of embezzlement in failing to pay over the fines in excess of the amounts entered on his docket and demanded by the Deputy Attorney-General as if he has refused to pay over the amounts entered on the docket and demanded. pp. 699-701.

EMBEZZLEMENT.—Justices of the Peace.—Fines Collected.—Indictment.—Description of Money.—In an indictment against a justice of the peace for the embezzlement of fines collected by him it was sufficient to describe the sum embezzled as money, simply, without specifying any particular coin, note, bill, or currency. p. 701.

From the Lake Circuit Court. *Affirmed.*

A. F. Knotts, for appellant.

W. L. Taylor, Attorney-General, *J. O. Bowers*, *Merrill Moores* and *C. C. Hadley*, for State.

MONKS, J.—The appellant, a justice of the peace of Lake county, Indiana, was indicted for embezzlement under §2020 Burns 1894, §1943 R. S. 1881 and Horner 1897. The indictment was in four counts and charged the embezzlement of fines amounting to \$500, assessed in criminal prosecutions and received and held by appellant by virtue of his office of justice of the peace. Appellant was tried and convicted on the third count, the other counts having been quashed by the court.

The fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth and eighteenth errors assigned are causes for a new trial, and such assignments of error, therefore, present no question for review in this court. *Zimmerman v. Gaumer*, 152 Ind. 552; *Burnett v. Milnes*, 148 Ind. 230.

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It is claimed that the said third count is bad because: (1) It shows that the demand was made by Charles B. Lockhart, Deputy Attorney-General; and (2) it is not alleged in said count that the defendant had or held, on the first Monday of July, 1897, more than three times the amount he would receive as mileage under §1516 Burns 1894, §1448 R. S. 1881 and Horner 1897.

The Attorney-General in person or by his deputies and assistants is authorized to demand and recover from justices of the peace fines assessed in criminal prosecutions which they have received and hold in their official capacity and have failed to pay over to the county treasurer as required by §§1515, 1516 Burns 1894, §§1447, 1448 R. S. 1881 and Horner 1897.

Courts will not take judicial notice of the official character of the deputies or assistants of the Attorney-General. 1 Greenleaf on Ev. §6; 17 Am. & Eng. Ency. of Law (2nd ed.) 919; *Slaughter v. Barnes*, 3 Marshall (Ky.) 412, 13 Am. Dec. 190, and note p. 192. No question, therefore, of the official character of said Lockhart, when he made the demand alleged, is presented by the motion to quash. Whether or not he was Deputy Attorney-General as alleged was a question of fact to be established at the trial of the cause.

It is alleged in said third count that the demand was made September 14, 1897, for the money collected before July 5th, the first Monday in July, 1897.

It is provided by statute that "Each justice of the peace shall, on the first Monday in January, and on the first Monday in July of each year, make a report to, and pay over to, the county treasurer of his respective county all fines collected by him since his last previous report, verifying such report by oath: Provided, that at the time of making such report the amount of the fines collected shall exceed three times the amount that he would be entitled to draw from the county as mileage in making such report.

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Where the amount of fines collected by any justice of the peace does not exceed three times the amount that he would be entitled to as mileage in making such report, he shall report by writing to the treasurer of the county the exact amount of fines collected by him, and retain the same until the next semiannual settlement: Provided, that at the expiration of his term of office he shall make full report, and pay over to the treasurer all fines collected by him and not heretofore paid." §§1515, 1516 Burns 1894, §§1447, 1448 R. S. 1881 and Horner 1897.

It is the duty of the Attorney-General under §7692 Burns 1894 (§9, Acts 1889, p. 126) to compel the payment by justices of the peace of all fines received by them in their official capacity which they have failed, neglected or refused to pay over to the proper county treasurer, as required by said §§1515, 1516, §§1447, 1448, *supra*. *State v. Denny*, 67 Ind. 148; *Carr v. State*, 81 Ind. 342.

Section 2020 Burns 1894, §1943 R. S. 1881 and Horner 1897, provides that any justice of the peace who shall fraudulently fail or refuse, at any time during the term for which he was elected, when legally requested by the proper person or authority, to account for, deliver and pay over to such person all moneys that may come into his hands by virtue of his office, shall be deemed guilty of embezzlement.

It will be observed that the statute requiring the semi-annual report from justices of the peace, provides for such report and for the paying over to the county treasurer of all funds collected by him since the last report. The exception that the report is not required if the fines collected shall not exceed three times the mileage he would be entitled to draw from the county, is not so incorporated in the statute as to become a part of the enacting clause thereof, §1515 §1447, *supra*.

In a suit by the Attorney-General, on the official bond of appellant as justice of the peace, to recover said fines, it

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would not be necessary to negative in the complaint the exception mentioned in said proviso or prove it at the trial, because the same is not a part of the enacting clause and is therefore a matter of defense. Black on Interpretation of Laws, p. 272; Sedgwick on Stat. Const. (2nd ed.) 50; *Trustees of First Baptist Church v. Utica, etc., R. Co.*, 6 Barb. 313; *Vavasour v. Ormrod*, 6 Barn. & Cress. 430.

The same rule prevails in criminal pleading in this State. *Hewitt v. State*, 121 Ind. 245, 246, 247, and cases cited; *Mergentheim v. State*, 107 Ind. 567; *State v. Maddox*, 74 Ind. 105; *State v. Stapp*, 29 Iowa 551; Gillett's Crim. Law, §132a; 1 Bishop's Crim. Proc. §631 *et seq.*; Wharton's Crim. Pl. & Pr. (9th ed.) §§238, 239.

If in such civil action by the Attorney-General it is not necessary to negative the proviso, it is evident that it is not necessary to negative the same in the indictment in this case. It follows that the court did not err in overruling appellant's motion to quash the third count of the indictment.

It is assigned as a cause for a new trial that the court erred in giving instructions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18 and 19. To render this cause for a new trial available all the instructions named must be erroneous. *Masterson v. State*, 144 Ind. 240, 246 and cases cited; *Conrad v. State*, 144 Ind. 290, 297; *Lawrence v. Van Buskirk*, 140 Ind. 481, 482.

It is not claimed by appellant that there was any error in giving instructions 1, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17 and 18. Said cause for a new trial must therefore fail.

The assignment of the court's refusal to give the instructions requested by appellant, as a cause for a new trial, was also joint as to all instructions refused. As it is not claimed that all refused were correct, for the same reason this cause for a new trial presents no available error. *Conrad v. State*, 144 Ind. 290, 297.

Misconduct of a juror is assigned as a cause for a new

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trial but as the affidavits filed in support thereof are not contained in a bill of exceptions, there is nothing in the record to sustain the same. *Siple v. State*, 154 Ind. 647; *Graybeal v. State*, 145 Ind. 623, and cases cited; *Reed v. State*, 147 Ind. 41, 48.

That the verdict is contrary to the evidence, and that the same is contrary to law are assigned as causes for a new trial. It is insisted that there is no evidence that Charles B. Lockhart was Deputy Attorney-General as alleged in the indictment. Said Charles B. Lockhart testified at the trial in substance that he was Deputy Attorney-General of the State of Indiana and had been since January 1, 1896; that from January 1, 1896, until the trial of said cause he was the only traveling deputy of the Attorney General's office; that he was acting in the capacity of Deputy Attorney-General when he examined the dockets of appellant and made the demand alleged in the indictment. It is clear under the authorities that this insistence of appellant can not be sustained. 1 Greenleaf on Ev. (16th ed.) §563g; 1 Phillips on Ev. (4th Am. ed.) 592 and notes, (5th Am. ed.) 489, and notes; Wharton on Ev. §164; *Wilcox v. Smith*, 5 Wend. 231; *Commonwealth v. McCue*, 82 Mass. 226; *Commonwealth v. Kane*, 108 Mass. 423.

Appellant contends that the law only provides for one Deputy Attorney-General. There is nothing in the law, creating the office of Attorney-General and prescribing his duties, which fixes the number of his deputies. His right to discharge his official duties by deputy is recognized by statute. (§§7689, 7694 Burns 1894.) And it is provided that he shall have such deputies as the Governor, Secretary and Auditor of State may deem necessary. §7696 Burns 1894, §5671 R. S. 1881 and Horner 1897. The salary law of 1895 (Acts 1895, §6, p. 320, §6410 Burns Supp. 1897), fixes the salaries for two deputies for the Attorney-General. The General Assembly at each session since 1895 has made provision for the payment of two depu-

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ties for the Attorney-General. Under such circumstances it is evident that appellant can not in this case question the right of the Attorney-General to have two deputies.

Appellant insists that the evidence discloses that he paid over to Lockhart, deputy Attorney-General, and other persons authorized by law to receive the same, more money than he received for fines prior to the first Monday in July, 1897. Under the law appellant was only required to pay over to the Deputy Attorney-General, in September, 1897, when the demand was made, fines collected by him prior to the first Monday in July, 1897, and the indictment only charges the embezzlement of money received for fines prior to that date.

The evidence shows that in September, 1895, Leach, Deputy Attorney-General, received from appellant, a justice of the peace, fines collected by him before that date; that on June 24, 1896, appellant reported and paid over to the treasurer of Lake county fines collected by him before that date amounting to \$83.05, and that he paid over to Lockhart, Deputy Attorney-General, in September, 1897, \$88.83, making a total of \$171.88 since the settlement with the Deputy Attorney-General in September, 1895. The evidence shows that appellant, as justice of the peace, since the settlement in September, 1895, collected fines amounting to much more than \$171.88. Appellant contends, however, that the evidence does not show that fines in excess of \$171.88 were collected prior to the first Monday in July, 1897. It appears from the record that when the State was giving evidence in regard to the fines collected by appellant, he, by counsel, objected to any evidence of fines received by him after the first Monday in July, 1897, which objection was sustained and the court ruled that the State was limited to evidence of fines collected by appellant after the settlement with the Deputy Attorney-General in September, 1895, and before the first Monday in July, 1897. Appellant by counsel suggested that they could go over the

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dockets more rapidly if appellant and his counsel and counsel for the State "would go over the books and we might agree what the books showed, we can run over it more rapidly." The court granted said request. Afterwards counsel for the State stated that he would take "the cases in their order" and, without objection from appellant, read a list of cases showing title and amount of fines assessed and paid. The date of the assessment of the fine and date of payment were given in some cases and in some they were not. In no case did the evidence show that the fine was assessed or paid after the first Monday in July, 1897. If any of said fines were paid after said date, appellant should have objected to the same for that reason, but no objection was made by appellant to said evidence or any part of it. In view of the ruling of the court and what was said by court and counsel before the evidence was given, the jury clearly had the right to consider the same as evidence of payments made to appellant prior to the first Monday in July, 1897. Only payments of fines made to appellant prior to that date were admissible in evidence, and the court had so held. There was evidence, therefore, which warranted the jury in finding that appellant, as a justice of the peace, received of fines prior to July 5, 1897, much more than the \$171.88, which he had paid over to persons authorized to receive the same.

It is next insisted that the evidence shows that Lockhart only demanded \$88.83 of appellant, which he paid, and that therefore there was no embezzlement under §2020 Burns 1894, §1943 R. S. 1881 and Horner 1897. It appears from the evidence that Lockhart, acting as Deputy Attorney-General, in September, 1897, examined the dockets kept by appellant as justice of the peace, and made a list of the fines collected by him as such justice of the peace since the settlement made with appellant by Leach, a former Deputy Attorney-General; that the amount of the fines so listed as collected by appellant, after giving him credit with the amount of \$83.05 reported and paid to the county treasurer

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June 24, 1896, was \$88.83; that Lockhart, as such deputy, demanded the same from appellant who paid over on such demand \$28.83, and Lockhart informed him that he would return in about two weeks when he must pay the balance. Lockhart afterwards returned and appellant paid him \$60.

The evidence shows, however, that in a number of cases persons were fined by appellant as justice of the peace, and the fines and costs paid, and that the fines entered on the docket in such cases were for much smaller sums than those assessed and collected. In one case the fine assessed and paid was \$20, and appellant entered judgment on his docket in said case for a fine of \$1. In a number of instances fines were assessed at \$5, and \$10 and paid, and appellant entered the same on his dockets as fines for only \$.25 and \$1.

The Deputy Attorney-General in September, 1897, made his list of fines collected upon the basis of the fines as entered upon appellant's dockets. While Lockhart, as Deputy Attorney-General, made demand for the amount of fines collected by appellant, as shown by the list made from appellant's dockets, yet in legal effect it was a demand for all fines collected by appellant prior to the first Monday in July, 1897; and it was the duty of appellant on such demand to pay over to the Deputy Attorney-General all fines collected prior to said date and not paid over to the proper officer. It was the duty of the Attorney-General to collect all fines received by appellant prior to the first Monday of July, 1897, and not paid over to the proper officer. The Deputy Attorney-General examined the dockets kept by appellant, as justice of the peace, for the purpose of ascertaining the amount of fines received by appellant prior to that date. He failed to ascertain the correct amount because of false entries made by appellant, as justice of the peace, in his dockets, showing fines for less amounts than were assessed and collected by him in said cases. Appellant, in failing to pay over on said demand the part of the fines assessed and collected by him in excess of the fines

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entered on his docket as assessed and paid in such cases, was as much guilty of embezzlement under the statute as if he had refused to pay over the \$88.83 on said demand.

Appellant next insists that the verdict is contrary to law because there was no evidence to sustain the allegation in the indictment that the kind and description of the money embezzled was unknown to the grand jury. The money alleged to have been embezzled by appellant is described as \$500 which "then and there circulated as money of the United States of America and then and there of the value of \$500, a more particular description of which money is to the grand jury unknown and can not be given." It was sufficient to describe in the indictment said \$500 as money, simply without specifying any particular coin, note, bill or currency. §1819 Burns 1894, §1750 R. S. 1881 and Horner 1897. *Taylor v. State*, 130 Ind. 66; *Hammond v. State*, 121 Ind. 512; *Rains v. State*, 137 Ind. 83.

It was not necessary to prove the value of the money. *McCarty v. State*, 127 Ind. 223.

The allegation in regard to a more particular description of the money being unknown to the grand jury, was not necessary to the sufficiency of the indictment. The money was sufficiently described under the laws of the State, and the fact that a more particular description was unknown to the grand jury was immaterial. The proof of said allegation was unnecessary. *Taylor v. State*, *supra*.

Finding no available error in the record, the judgment is affirmed.

Larned v. Elliott.

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158 129

LARNED v. ELLIOTT ET AL.

[No. 19,407. Filed July 10, 1900.]

From the Marion Circuit Court. *Affirmed.**J. J. M. La Follette* and *W. W. Thornton*, for appellant.*W. L. Taylor*, Attorney-General, *Merrill Moores* and *C. C. Hadley*, for appellees.

PER CURIAM.—If the laws of this State provide for the election of township trustees and township assessors at the November election, 1900, this case must be affirmed, otherwise it must be reversed.

An act of the legislature approved February 25, 1897 (Acts 1897, p. 64), provides that the time of holding the election of township trustees and assessors shall be changed from the general election in November, 1898, to the general election in November, 1900, and at the general election every fourth year thereafter, and that said trustees and assessors shall qualify and enter upon the discharge of the duties of their respective offices at the expiration of ten days after such election.

Appellant insists, however, that said act is unconstitutional and void because it extended the terms of office of township trustees and assessors beyond the period of four years, in violation of article fifteen, section two of the Constitution which provides: "But the General Assembly shall not create any office the tenure of which shall be longer than four years." The same objection was urged against the validity of said act in *State v. Menaugh*, 151 Ind. 260, and this court held that said act was not in violation of said provision of the Constitution. See, also, *State v. Burke*, 154 Ind. 645; *Scott v. State*, 151 Ind. 556, 561; *State v. Compson*, 84 Ore. 25, 54 Pac. 849.

After a careful consideration of the question involved, we adhere to the conclusion reached in the case of *State v. Menaugh*, *supra*, that said act of 1897 (Acts 1897, p. 64), is constitutional, and that township trustees and assessors are to be elected at the November election, 1900, and enter upon the discharge of the duties of their respective offices as provided in said act.

The judgment of the court below is, therefore, affirmed.

Lane v. City of Crawfordsville.

BOARD OF COMMISSIONERS OF JASPER COUNTY ET AL.
v. MARION.

[No. 18,865. Filed October 25, 1900.]

From the Jasper Circuit Court. *Reversed.*

W. F. Townsend, A. E. Chizum, C. W. Hanley and J. J. Hunt, for appellants.

F. Foltz, C. G. Spitler, H. R. Kurrie, E. B. Sellers and W. B. Austin, for appellee.

BAKER, C. J.—Appellee began two suits, which were afterwards consolidated, to enjoin payment under contracts entered into between the board of commissioners of Jasper county and Fleener and Carnahan, whereby the latter were to search for and report to the county auditor concealed, omitted, and unassessed taxable property, and to receive for their services a percentage of all taxes collected through their efforts. The errors assigned and not waived question the action of the court in overruling the demurrers to the complaints and the motion for a new trial.

The controlling facts are the same as those in *Board v. Dickinson*, 153 Ind. 682, and upon the authority of that case the judgment herein is reversed with instructions to sustain the demurrers to each paragraph of complaint.

LANE v. CITY OF CRAWFORDSVILLE.

[No. 19,150. Filed November 14, 1900.]

From the Montgomery Circuit Court. *Affirmed.*

H. H. Ristine and Harold Taylor, for appellant.

Charles Johnston and W. H. Johnston, for appellee.

HADLEY, J.—Action to restrain appellee from proceeding with the improvement of Plum street under the provisions of the act of March 8, 1889, commonly known as the Barrett law.

The material facts and question presented in this case are similar to the facts and question presented in *Taylor v. City of Crawfordsville*, ante, 430, and upon the authority of that case the judgment in this is affirmed.

United States Savings, etc., Co. v. Rider.

**SELLERS ET AL. v. MUTUAL HOME AND SAVINGS
ASSOCIATION.**

[No. 18,851. Filed December 12, 1900.]

From the Marion Superior Court. *Affirmed.*

D. A. Leach, for appellants.

E. E. Stevenson, for appellee.

BAKER, J.—Appellants brought this suit to compel the release of a building and loan mortgage. A demurrer was sustained to the complaint, and that ruling is assigned as error. The premium was a fixed rate. It is claimed that the contract is usurious. If it is usurious, the complaint shows sufficient payments to discharge the implied obligation to repay the money received of the association with six per cent. simple interest. If the contract is not usurious, it has not been satisfied. On similar facts, the questions here involved were decided adversely to appellants in *International, etc., Ass'n v. Wall*, 153 Ind. 554; and on the authority of that case the judgment is affirmed.

**UNITED STATES SAVINGS AND LOAN COMPANY v.
RIDER ET AL.**

[No. 18,854. Filed Nov. 23, 1900. Rehearing denied Jan. 29, 1901.]

From the Delaware Circuit Court. *Reversed.*

James Bingham and *Jesse Long*, for appellant.

Rollin Warner and *A. W. Brady*, for appellees.

HADLEY, J.—Foreclosure of a building and loan mortgage. The complaint recites that the plaintiff is engaged in doing a general building and loan business; that it is organized under the statutes of the state of Minnesota providing for the organization and government of building and loan associations, which statutes are set forth in full, went into force June 1, 1891, and are the same in general effect as the statutes of Indiana now in force relating to similar associations. These statutes, among other things, provide that "the directors of such association shall adopt by-laws for its government and therein describe the manner in which its business shall be transacted"; that "any premiums for loans made by any association governed by this act shall not be considered or treated as interest, nor render such association amenable to the laws relating to usury"; that "every such association shall provide in its by-laws in what manner applications and bids for loans shall be received and who shall be entitled to

United States Savings, etc., Co. v. Rider.

loans thereunder * * * provided that the provisions of this section relating to bidding for loans shall not apply to associations which fix the rate of interest and premium in any other manner"; that the plaintiff had done all the things required of it as a foreign corporation, by the act of June 6, 1852. The note and mortgage in suit, parts of the complaint, were executed January 2, 1893, the former providing that the debt should be canceled by the payment of interest, fines, and the monthly instalments stipulated. By-laws providing for fines for the non-payment of fixed monthly dues on stock, for the manner of making loans, and prescribing that a fixed rate of interest and a premium at a fixed rate per annum shall be paid by the borrower monthly, in advance, on all real estate loans, were alleged and exhibited with the complaint.

A demurrer to the complaint having been overruled, the Riders answered in two paragraphs: (1) A general denial, and (2) "to all that portion of plaintiff's complaint which seeks to recover interest in excess of the rate of six per cent. per annum." It is averred that on December 26, 1892, the Riders entered into a contract with the plaintiff, through its agent in Muncie, Indiana, by which the plaintiff loaned the Riders \$600; that at the same time Margaret Rider, to enable her to obtain the loan, and for no other purpose, subscribed for twelve shares of stock in plaintiff company, and executed the note and mortgage in suit whereby they acknowledge themselves indebted to the plaintiff in the sum of \$600, and bound themselves to pay the plaintiff interest on the same at the rate of six per cent. per annum, payable in monthly instalments, and also the further monthly sum of \$3.60, evasively called instalments on said shares of stock, but which was in fact only an additional payment of interest, and the further monthly sum of \$3.60, evasively called premium on the sum loaned, but which was only an additional payment of interest, also certain penalty sums, evasively called fines, to be imposed upon defendants for default in payment of interest, premiums, and stock instalments, as they severally became due, which, together with the interest, premiums, and instalments on stock, was in excess of eight per cent. per annum, in violation of law, and usurious; that the defendants reside in Muncie, Delaware county, Indiana, and the contract was made, and the real estate situate in said county; that since the execution of said note and mortgage the defendants have paid legal interest thereon \$129, and under the pretended and evasive names of instalments, premiums, and fines, and, in excess of six per cent. per annum, the sum of \$327. Prayer that all sums paid by them as instalments, premiums and fines, and all sums in excess of six per cent. per annum be declared usurious, and that the same be recouped from any amount that may be found due the plaintiff.

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The overruling of plaintiff's demurrer is challenged by the assignment of errors. No question is presented on account of the plaintiff being a foreign association, but the position taken by appellees is "that the contract sought to be enforced in this action is usurious, and could not have been made by either a foreign or a domestic building and loan company." It is said that the feature of the contract involved which distinguishes it from the authorized building and loan contract, and makes it usurious, is that the premium is fixed by contract at an annual *per centum*, payable monthly, whereas in authorized building and loan contracts the premium must be determined in gross by competitive bidding for the loan. Since the filing of the briefs in this case, the question here propounded has been decided by this court in *International Building, etc., Assn. v. Wall*, 158 Ind. 554, adversely to appellees' contention, and upon the authority of that case the demurrer to the second paragraph of answer should have been sustained. See, also, *Security, etc., Assn. v. Elbert*, 153 Ind. 186.

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1. **Railroads.—Highways.**—A railroad is not a public highway in the sense that lands acquired by the company for right of way or station purposes cannot be taken from it by adverse possession. *Pittsburgh, etc., R. Co. v. Stickley*, 312.

2. **Claim of Ownership.—Evidence.**—It was shown in an action in ejectment that plaintiff and her grantors built and maintained a fence on what they believed to be the true line of a lot, which included a strip of land belonging to defendant, and built a house with reference to such fence, and occupied the same for twenty-five years, treating the fence as the true boundary line. *Held*, that the evidence warranted the finding that plaintiff and her grantors claimed to own the land to the fence constructed by them. *Ib.*

3. **Claim of Ownership.—Evidence.**—In an action in ejectment the agreed statement of facts showed that M., the owner of certain real estate, conveyed a portion thereof to defendant railroad company, and that a part of such land was fenced in and used by plaintiff and her grantors who had been owners and in possession of an adjoining lot for twenty-five years, through a conveyance thereof from M., and that plaintiff and her grantees, believing that the line of said lot was several feet south of the true line, built a fence which extended the east line of said lot eighteen and one-half feet and the west line thirteen feet onto said strip so conveyed to the railway company, treating and believing the location of said fence to be the true line, and have had that much of said strip so fenced in, and have continuously used and occupied the same for more than twenty years last past next before the commencement of the action. *Held*, that the court was justified in finding that the deed from M. was made twenty-five years before the action was commenced, and that plaintiff and her grantors other than M. built and maintained the fence. *Ib.*

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1. *Interlocutory Orders.—Building and Loan Associations.—Receivers.*—An appeal by the holders of paid up and prepaid stock in a building and loan association will not lie from an order of court directing the receiver of the association, on his petition for instructions, to take proper steps to recover dividends illegally paid to holders of such stock. *Stewart v. Marion Trust Co., Rec.*, 174.
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6. *Appearance.—Parties.*—Though appellees' appearance will operate as a waiver of notice of appeal, it will not cure the omission of the names of the persons who should have been joined as appellants. *Goodrich v. Stangland, 279.*
7. *Parties.—Substitution.*—Where a cause was reversed on appeal for the reason that the right of action was vested in a person other than appellee, the person authorized to maintain the action in the court below cannot be substituted as a party during the time granted for filing a petition for a rehearing and be allowed to occupy the same position, and exercise the same rights, as though he had been originally a party to the action. *Maule Coal Co. v. Partenheimer, Adm., 100.*
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12. *Assignment of Error.—New Trial.*—Assignments that the finding of the court is contrary to the evidence, and contrary to law, are not subjects of independent assignments of error, but are causes for a new trial, and must be presented on appeal under motion for a new trial. *Hedrick v. Hall, 371.*
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APPEAL AND ERROR—Continued.

18. *Joint Assignment.*—Where on appeal from a judgment against certain city officers for damages for removing electric light poles from the streets of the city the evidence established the defense of justification on the part of some of the defendants only, the judgment will not be reversed for such reason on a joint motion on the part of all of the defendants for a new trial.

Coverdale v. Edwards, 374.

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Crawford v. State, 692.

20. *Separate Assignments of Error.—Drains.*—In a proceeding for the construction of a drain, under §5655 *et seq.* Burns 1894, the rights of each party remonstrating must be separately determined by the jury, and if a new trial is desired by one or more of the remonstrators, who are the owners of separate tracts of land, a separate motion therefor must be filed, and, upon appeal from the action of the court in overruling such motions for a new trial, a separate assignment of errors should be filed by each landowner.

Yeoman v. Shaeffer, 308.

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Taylor v. Canaday, Rec., 671.

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23. *Record.—Precipe.—Bill of Exceptions.—Certificate.*—Where the clerk was directed by precipe to prepare a transcript of the proceedings and of certain papers and motions to be used on appeal to the Supreme Court, without direction to certify any bill of exceptions, a bill of exceptions containing the evidence embraced in the transcript is not properly a part thereof, and is not identified or covered by the clerk's certificate authenticating the papers named in the precipe.

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APPEAL AND ERROR—Continued.

- any, in the indictment, and was properly overruled for that reason, or that the causes assigned for arresting the judgment were so defectively stated as to present no question. *Ib.*
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McCaslin v. Advance Mfg. Co., 298.
28. *Misconduct of Jury.—Affidavits.—Record.*—No question is presented on appeal upon an assignment in a motion for a new trial as to the misconduct of a juror, where the affidavits filed in support thereof are not contained in the bill of exceptions.
Crawford v. State, 692.
29. *Motions.—Record.*—Where motions to strike out pleadings or exhibits are not made part of the record by bill of exceptions or by order of court they cannot be considered on appeal.
Webber v. Harding, 408.
30. *Record.—Motions.—Order of Court.*—To make the ruling of the court in sustaining a motion to strike out a pleading a part of the record by order of court, the motion, ruling and pleading must be set out in full in the order.
Allen v. Hollingshead, 178.
31. *Record.—Motions.*—A motion to strike out a pleading and the ruling of the court thereon can only be made part of the record by bill of exceptions or by order of court. *Ib.*
32. *Precipe.—Transcript.*—A bill of exceptions not mentioned in appellant's precipe, as provided by §649 Horner 1897, is no part of the record, even if copied into the transcript and certified by the clerk, and cannot be considered on appeal.
McCaslin v. Advance Mfg. Co., 298.
33. *Record.—Evidence.—Time of Filing.—Act of 1899.*—Under the provision of the act of 1899 (Acts 1899, p. 384) that the transcript of the evidence shall be filed with the clerk within a time fixed by the court trying such cause, the court must act while the cause is before it, and when the time granted had expired, with nothing done, it was too late at the next term of court to fix a time within which the transcript of the evidence might be filed, as the cause was no longer *in fieri*.
Drake v. Everson, 47.
34. *Motion to Correct Record.—Review.*—A ruling on a motion to correct a record will not be reversed on appeal where the bill of exceptions does not contain all the evidence introduced on the trial of such motion.
McCaslin v. Advance Mfg. Co., 298.
35. *Record.*—The party asserting that a ruling of the trial court is erroneous must cite the page and line of the record containing such ruling. *Ib.*
36. *Nunc Pro Tunc Entry.—Oral Evidence.*—Oral evidence alone is not sufficient to authorize the correction of a record. *Ib.*
37. *Record.—Judgments.—Trial.—Submission.*—The following entry appeared in the record on appeal: "Come the parties, by their attorneys, and on plaintiff's motion the court heard further testimony in this cause, to which the defendant excepts. The court, having heard the further testimony, and being advised in the premises, finds for the plaintiffs" *Held*, that it was sufficiently disclosed that there was a submission, trial and finding.
Troxel v. Thomas, 519.

APPEAL AND ERROR—Continued.

38. *Clerk's Certificate.—Drains.*—The certificate of the clerk to the transcript in an appeal in a drainage proceeding that the transcript contains true and complete copies of all the papers introduced and entries made in said cause is insufficient, as required by §662 Burns 1894, as it does not show that all papers pertaining to the case are contained in the transcript. *Yoeman v. Shaeffer, 308.*
39. *Special Finding.—Conclusions of Law.*—A conclusion of law erroneously included in the special finding of facts will be disregarded on appeal. *Baldwin v. Heil, 682.*
40. *Special Finding.—Practice.*—It is not reversible error to overrule a motion for judgment on a special finding and conclusion of law, if the judgment when so rendered would not conform to the conclusion of law, even if such conclusion is erroneous. The proper remedy is by an exception to such conclusion of law, and assigning the same as error on appeal. *Allen v. Hollingshead, 178.*
41. *Conclusions of Law.—Joint Exception.*—A joint exception to more than one conclusion of law is not available on appeal if any one of the conclusions is sufficient. *Taylor v. Canaday, Rec., 671.*
42. *Conclusions of Law.—Joint Exception.*—Where the exception to the conclusion of law was made jointly, if any one of them is correct the exception must fail as to all. *Baldwin v. Heil, 682.*
43. *Evidence.*—Available error cannot be predicated upon the action of the court in excluding evidence, where the offer to prove was not made until after the objection was made and sustained. *Mark v. North, Adm., 575; Wilson v. Carrico, 570.*
44. *Harmless Error.*—In an action against a city marshal and others for damages for removing electric light poles and wires belonging to plaintiff, the alleged error of the court in sustaining a demurrer to defendants' answer in justification is not available to appellants where they admitted in their brief that the court permitted all evidence to be admitted under the general denial which would have been admissible under the answer in justification. *Coverdale v. Edwards, 374.*
45. *Mandamus.—Alternative Writ.*—A judgment on demurrer to an alternative writ of mandate will not be reversed on appeal because the demurrer was addressed to the alternative writ instead of the writ and petition, unless the facts exhibited in the petition and alternative writ entitled the relator to the relief sought. *State, ex rel., v. Indiana Board of Pharmacy, 414.*
46. *Interlocutory Order.—Contempt.—Depositions.—Witnesses.*—An order of court made under the provisions of §420 Burns 1894 requiring a witness to appear before an officer and give his deposition is an interlocutory order, and not a final order from which an appeal will lie. *In re Ray, 31.*
47. *Terms of Circuit Court.—Judicial Notice.*—The Supreme Court takes judicial notice of the terms of circuit courts. *Taylor v. Canaday, Rec., 671.*
48. *Judgment.—Default.—Practice.*—Error cannot be predicated upon the action of the court in failing to render judgment against defendants who failed to appear or were defaulted, where plaintiff proceeded to trial against the other defendants, as if no default had been made, and did not ask for judgment by default against those who failed to appear. *Hedrick v. Hall, 371.*

ASSAULT AND BATTERY—Touching person of female child under age of fourteen years with intent to perform act of sexual intercourse, see RAPE, 1; *Hanes v. State*, 112.

ATTORNEY-GENERAL—As to appointment of deputies, see OFFICERS, 2; *Crawford v. State*, 692.

Courts will not take judicial notice of the official character of the deputies or assistants of the Attorney-General. See JUDICIAL NOTICE; *Ib.*

As to demand by Deputy Attorney-General upon justice of the peace for fines due the State, see JUSTICES OF THE PEACE, 2; CRIMINAL LAW, 4. *Ib.*

ATTORNEY'S FEES—In partition proceedings, see PARTITION; *Osborne v. Eslinger*, 351.

BARRETT LAW—See MUNICIPAL CORPORATIONS.

BILLS AND NOTES—

Signatures. — Evidence. — In an action against a corporation by an indorsee on a promissory note it appeared that the name of the corporation was printed at the head of the note, and that the note was signed by an individual with the word "President" following the name. The complaint alleged that the person who signed the note was the president of the company; that the note was executed by the company, through such person as president, for a debt owing by the company to the payee, and that the payee accepted the same as the note of the company. *Held*, that extrinsic evidence was admissible to explain the instrument.

Second Nat. Bank v. Midland Steel Co., 581.

BUILDING AND LOAN ASSOCIATIONS—An appeal will not lie from an order of court instructing a receiver to take steps to recover dividends illegally paid stockholders. See APPEAL AND ERROR, 1; *Stewart v. Marion Trust Co.*, *Rec.*, 174.

1. *Liquidation. — Payment of Instalments After Association goes into Liquidation. — Rights of Borrowing Members.*—Where a building and loan association abandons the objects for which it was organized by going into voluntary liquidation it thereby releases its borrowing members from their obligations to continue the stipulated monthly payments under the contract, and where a member continued her monthly payments after the association had gone into liquidation she was entitled to have the whole amount of the instalments paid by her after the association went into liquidation, including the sum paid as dues, applied on her debt.

Fidelity Building, etc., Union v. Smith, 679.

2. *Insolvency. — Foreign Associations. — Preference of Stockholders.*—A foreign building and loan association entered the State of Indiana in 1890, complied with the laws in force relative to foreign corporations, issued stock and made loans from a common fund collected from the various States in which it did business until the passage of the act of 1893 requiring such associations to make a deposit, when the association ceased doing any new business. Thereafter the association became insolvent, a receiver of its assets in Indiana was appointed, and a general receiver for all of its assets save those of Indiana, and, it

BUILDING AND LOAN ASSOCIATIONS—Continued.

appearing that the assets in Indiana exceeded the claims, appellee on behalf of the Indiana stockholders, sought to have the Indiana stockholders paid in full from the assets in the State. *Held*, that the Indiana stockholders have no preferential claim upon the Indiana assets. *MacMurray v. Sidwell*, 560.

CANCELATION OF INSTRUMENTS—Parties to an action where instrument was transferred, see PARTIES, 2; *Troxel v. Thomas*, 519.

Fraud.—Deeds.—Quieting Title.—A complaint to obtain the cancellation of a deed executed by plaintiff, and to quiet his title to the land described, alleged that plaintiff, who was old and infirm, conveyed his farm, of the value of \$6,000, to his daughter and her husband in consideration of their oral promise to give him a home with them on the land so long as he should live, and to support, provide for, nurse, and take care of him when sick, and for the further consideration that the grantees should execute to him their promissory notes for \$1,000 with interest, payable at such time as should be agreed upon; that after the execution of the deed the grantees failed to provide him with a home, and refused to execute their notes as agreed. *Held*, that the facts averred showed fraud and were sufficient to entitle plaintiff to a judgment canceling the deed and quieting his title to the land. *Sherrin v. Flinn*, 422.

CARRIERS.—See RAILROADS.

1. *Contributory Negligence.*—In an action for personal injuries to a railway passenger, a finding that the passenger at the time of the accident was seated in one of the seats of the chair-car, as directed by defendant's servants, and that the car was derailed and precipitated over a bank, shows an absence of contributory negligence upon the part of the passenger at the time of the accident. *Terre Haute, etc., R. Co. v. Sheeks*, 74.
2. *Negligence.—Personal Injuries.*—The law exacts of a railroad company engaged in carrying passengers the highest practicable care for the safety of its passengers in the operation of its trains, and in keeping its road, machinery and appliances in a safe condition, and while the burden is upon the passenger suing for personal injuries to maintain the affirmative of the issue, the mere happening of the accident is at least *prima facie* evidence of negligence upon the part of the carrier. *Ib.*
3. *Negligence.—Personal Injuries.*—In an action against a railroad company for personal injuries sustained by plaintiff by the derailment of the car in which she was riding, caused by running the train at a very high rate of speed down a heavy grade upon a curve having near its middle an unsafe switch, the company is not exonerated of the charge of negligence by the fact that the rail which broke weighed seventy pounds to the yard, was made by a reputable manufacturer, had been in use about eighteen months, was well spiked to sound ties, had been inspected a few hours before the accident, and there was nothing to indicate but what the switch was as safe for the use of trains at the time of the accident as it was before. *Ib.*

CASES—See OVERRULED CASES.

For TABLE OF CASES CITED, see page vi.

CITIES—See MUNICIPAL CORPORATIONS.

COLLATERAL ATTACK—Judgment of board of commissioners establishing a highway not subject to, see COUNTIES, 1; *Helms v. Bell*, 502.

The legal existence of a *de facto* corporation can not be attacked collaterally. See CORPORATIONS, 1, 2; *Doty v. Patterson*, 60.

COMMERCE—The provision of the act of 1889 (Acts 1889, p. 369), prohibiting the transportation of natural gas out of the State, contravenes the federal Constitution relating to interstate commerce. See NATURAL GAS, 1; *Manufacturers Gas, etc., Co. v. Indiana Natural Gas, etc., Co.*, 545.

COMMISSIONERS COURT—See COUNTIES.

COMPLAINT—See PLEADING.

CONSTITUTIONAL LAW—See STATUTES.

The provisions of the Indianapolis city charter relative to street improvements are not in violation of the federal or State Constitution. See MUNICIPAL CORPORATIONS, 7; *City of Indianapolis v. Holt*, 222.

The provision of the act of 1889 (Acts 1889, p. 369), prohibiting the transportation of natural gas out of the State, is unconstitutional. See NATURAL GAS, 1; *Manufacturers Gas, etc., Co. v. Indiana Nat. Gas, etc., Co.* 545.

The act of 1895 (Acts 1895, p. 217), requiring the levy and collection of a special tax in the township in which the county seat should be located, to provide funds for the erection of the buildings, is unconstitutional. See TAXATION; *Board, etc., v. State, ex rel.*, 604.

Section 2209 Burns 1894, making it unlawful for any person to have in his possession quail during the close season, is not unconstitutional. See GAME, 1; *Smith v. State*, 611.

Statute authorizing State board of health to adopt by-laws to prevent the spread of contagious diseases is not a delegation of legislative authority in violation of the Constitution. See HEALTH, 1; *Blue v. Beach*, 121.

When contract by county employing expert accountants to examine books of county officers is not void, though the debt incurred by the county was in excess of the constitutional limit, see COUNTIES, 8; *Board, etc., v. Gardner*, 165.

Section 2090 Burns 1894, prohibiting females from living in houses of ill-fame is constitutional. See CRIMINAL LAW, 24; *Webber v. Harding*, 408.

1. *Act Authorizing Organization of Board of School Commissioners for City of Indianapolis.—Special Legislation.*—The act of March 8, 1871, authorizing the organization of a board of school commissioners in all cities of 30,000 or more inhabitants, "accord-

CONSTITUTIONAL LAW—Continued.

ing to the United States census for the year 1870," there being only one city in the State at the time of the enactment of the statute containing such a population, is unconstitutional, being special legislation. *Campbell v. City of Indianapolis, 186.*

2. *Act Concerning Schools in Cities of 100,000 Inhabitants.*—The act of March 4, 1899 (Acts 1899, p. 434), concerning common schools in cities having a population of 100,000 "according to the last United States census" is an act of general application, and is constitutional, though at the time it was enacted there was but one city in the State containing such population. *Ib.*
3. *Act Concerning Schools in Cities of 100,000 Inhabitants.*—The act of March 4, 1899 (Acts 1899, p. 434), "concerning common schools in cities having a population of 100,000," etc., is not rendered special legislation and, therefore, unconstitutional by the provision of section 4 thereof, to the effect that, "At the city election occurring on the second Tuesday of October, 1899, five members of the board of school commissioners shall be elected to serve as herein provided," although there was at the time of the enactment no city in the State other than Indianapolis which held an election on the second Tuesday of October, 1899. *Ib.*
4. *Remedial Legislation.*—Although the act of March 8, 1871, authorizing the election and defining the duties of a board of school commissioners for cities of 80,000 population is unconstitutional, the acts of such board in issuing and negotiating school bonds are cured by the act of March 4, 1899 (Acts 1899, p. 434). *Ib.*

CONTRACTS—Contract with a *de facto* corporation may be enforced. See CORPORATIONS, 8; *Doty v. Patterson, 60.*

The enforcement of the provisions of §2 of the act of 1889 (Acts 1889, p. 430), regulating the law of descent, enacted subsequently to the execution of the deed, but before the death of the widow, does not amount to an impairment of contracts. See DESCENT AND DISTRIBUTION, 2; *Burget, v. Merritt 143.*

Where the holder of a lien on real estate surrendered the same in order that the owner might secure from a building and loan association a larger loan, and upon an agreement with the building and loan association that it would turn over to such original lien holder any part of the loan not used in the construction of a building contemplated, and in violation of this agreement the association paid \$800 to the mortgagor, the original lien holder was entitled to recover said amount on cross-complaint in a suit to foreclose instituted by the building and loan association. See MORTGAGES, 9; *People's, etc., Assn. v. Carey, 324.*

Partnership.—Farm Contracts.—Landlord and Tenant.—An agreement by which the owner of lands contracts with another that such lands shall be occupied and cultivated by the latter, each party furnishing a certain proportion of the seed, implements, and stock, and that the products shall be divided at the end of a given term, or sold and the proceeds divided, does not create a partnership between the parties. *Shrum, Adm., v. Simpson, 160.*

CONTRIBUTORY NEGLIGENCE—Of traveler at railroad crossing, see RAILROADS, 8; *Chicago, etc., R. Co. v. Thomas, Adm.*, 634.

A railway passenger injured by the derailing of the train, who at the time of the accident was seated in the chair-car as directed by the trainmen, is not guilty of contributory negligence. See CARRIERS, 1; *Terre Haute, etc., R. Co. v. Sheeks*, 74.

Assumption of Risk.—Damages.—Railroads.—In an action against a railroad company for damages for the death of plaintiff's decedent it was alleged that decedent was a section hand employed by defendant; that it was the custom of defendant to permit all persons hired to work on the road to ride from their work to their residences; that decedent boarded one of defendant's freight trains, which had no caboose or passenger car attached, and took a position on the front platform of the last freight car, and, in passing over a defect in the track, deceased was suddenly jerked and thrown from his footing to the ground and injured, from which injuries he died. *Held*, that the facts pleaded not only show that deceased was guilty of negligence contributing to his injury, but that he assumed the risk.

Coyle, Adm., v. Pittsburgh, etc., R. Co., 429.

CORPORATIONS—See BUILDING AND LOAN ASSOCIATIONS; MUNICIPAL CORPORATIONS.

Discriminating charges in furnishing gas, see GAS; *Richmond Nat. Gas Co. v. Clawson*, 659.

Forfeiture of franchise of railroad company for surrendering corporate property to rival company, see RAILROADS, 1, 2, 3, 4; *Eel River R. Co. v. State, ex rel.*, 433.

Where a foreign building and loan association is insolvent, and its assets are in the hands of a receiver, Indiana stockholders have no preferential claim upon the Indiana assets. See BUILDING AND LOAN ASSOCIATIONS, 2; *MacMurray v. Sidwell*, 560.

Extrinsic evidence may be admissible to show that a promissory note signed by an individual, with the word "President" following his name, was the obligation of the company. See BILLS AND NOTES; *Second Nat. Bank v. Midland Steel Co.*, 581.

1. **Corporate Existence.—De Facto Corporation.—Collateral Attack.**—When there is a statute authorizing the creation of a corporation, an attempt to comply with the statute, and an actual exercise of corporate functions, although some formalities required by law have been omitted, there is at least a corporation *de facto*, the legal existence of which can only be questioned in a direct proceeding brought by the proper person for that purpose.

Doty v. Patterson, 60.

2. **Corporate Existence.—De Facto Corporation.—Collateral Attack.**—The rule that the corporate existence of a *de facto* corporation cannot be attacked collaterally is not limited to cases where one by contract admits corporate existence, but is a rule of general application. *Ib.*

3. **De Facto Corporations.—Enforcement of Contracts.**—The contracts of *de facto* corporations may be enforced by and against them the same as if they were corporations *de jure*. *Ib.*

CORPORATIONS—Continued.

4. *Stockholders.—Liability of Stockholder as Partner.*—Stockholders in a *de facto* corporation cannot be held liable as partners, although there have been irregularities, omissions, and mistakes in incorporating the company. *Ib.*
5. *Railroads.—Domicil.*—For the purpose of determining the location of the domicil or residence of a domestic railroad company resort may be had to those principles which are applied in the case of natural persons. *Eel River R. Co. v. State, ex rel., 433.*
6. *Railroads.—Process.*—Where a domestic railroad company had no officer or agent in the State except an agent appointed to receive and accept service of process, service in a county other than the one in which the suit was brought was sufficient. *Ib.*
7. *Railroads.—Domicil.*—Where a domestic railroad company had surrendered its property and franchises, under a lease in perpetuity, to another company, and ceased to do business as a railroad company, maintaining no office or agency in the State, its legal residence would be in the county where its principal office was located when it ceased to do business, although the annual meetings of stockholders were held in another county. *Ib.*

COSTS—

Mortgages.—Trust Deeds.—Where in an action to have a deed absolute on its face declared a mortgage, and for an accounting, the defendant answered, claiming to be the absolute owner of the real estate, and the issue thus tendered was decided against defendant, the costs of such issue were properly taxed against defendant. *Brown v. Follette, 316.*

COUNTIES—Removal of county seat, see **TAXATION**; *Board, etc., v. State, ex rel., 604.*

Establishment of highways partially within city limits, see **HIGHWAYS**; *Gascho v. Sohl, 417.*

An action cannot be maintained to enjoin the board of commissioners from letting a contract for the construction of a free gravel road, since an adequate legal remedy exists. See **GRAVEL ROADS**; *Board, etc., v. Conner, 484.*

Action will not lie to enjoin county commissioners from entering into a contract employing a person to prepare index to county records, since an adequate legal remedy is provided by statute. See **INJUNCTION**, 8; *Tackett v. Stevenson, 407.*

1. *Commissioners' Court.—Collateral Attack.*—A judgment of a board of county commissioners establishing a highway is not subject to collateral attack unless it is void. *Helms v. Bell, 502.*
2. *Commissioners' Court.—Highways.*—The commissioners' court has power to establish highways, but the conditions and manner of its exercise being clearly defined by statute, and the court being one of special and limited jurisdiction, the statutes must be strictly followed or the proceeding will be a nullity. *Ib.*
3. *Commissioners' Court.—Judgment.—Highways.*—A judgment of a board of county commissioners establishing a highway before the damages assessed were paid, as required by §6752 Burns 1894, is void, and the payment thirty days later did not render it valid. *Ib.*

COUNTIES—Continued.

4. *Treasurer.—State School Fund.*—In the receipt and disbursement of the State school funds a county treasurer exercises a State function, and an action cannot be maintained against the county for the recovery of such funds. *Wood, Treas., v. State, ex rel., 1.*
5. *Investigation of County Offices.—Contracts.—Injunction.*—A contract entered into by a board of county commissioners employing an accountant to investigate the books of the offices of auditor and treasurer is not void because of a stipulation therein that the deputy treasurer, who had been such deputy for eleven years of the period included in the proposed investigation, was to assist in the investigation. *Board, etc., v. Gardner, 165.*
6. *Investigation of County Offices.—Injunction.*—A charge in a complaint to enjoin the enforcement of a contract entered into by the board of county commissioners for the investigation of the records of county offices that the contract price for the labor to be performed by the expert was unreasonable, and more than other competent persons would have asked, is not a sufficient ground for an injunction. *Ib.*
7. *Investigation of County Offices.—Injunction.*—The fact that the books and records of county offices had been examined by other experts, and the accounts audited and corrected, was no reason why a further examination should not be made by the board of commissioners, since such examination was not conclusive. *Ib.*
8. *Limitation of Indebtedness.—Constitutional Law.*—A contract entered into by the board of county commissioners employing an accountant to examine the records of county offices is not rendered void by reason of the fact that the indebtedness of the county was in excess of the constitutional limit, and there was no money in the treasury, not otherwise appropriated, with which to pay the compensation of the expert, where the compensation was payable in instalments, and it was not shown that the county would be unable to pay the same from its current revenues. *Ib.*

COUNTY COUNCIL ACT—Under act of March 3, 1899, an action cannot be maintained by State to compel county officers to make an appropriation for aid to indigent school children. See **SCHOOLS**, 1; *Shelby County Council v. State, ex rel., 216.*

COUNTY REFORM LAW—See **SCHOOLS**.

COUNTY TREASURER—As to mandamus proceedings against to compel payment of an order, see **MANDAMUS**, 1, 2, 3, 4, 5, 6, 7; *Wood, Treas., v. State ex rel., 1.*

CRIMINAL LAW—See **EMBEZZLEMENT**; **HOMICIDE**; **RAPE**; **RECOGNIZANCE**.

Action by State to suppress gambling house, see **INJUNCTION**, 2; *State v. O'Leary, 526.*

Definition of malice as used in the statutes defining murder, see **INSTRUCTIONS**, 4, 5; *Harris v. State, 265.*

Incomplete instruction as to reasonable doubt, see **INSTRUCTIONS**, 3; *Ib.*

A motion in arrest of judgment and the ruling of the court thereon are a part of the record without a bill of exceptions. See **APPEAL AND ERROR** 25; *Harris v. State, 15.*

CRIMINAL LAW—Continued.

1. *Indictment.—Justices of the Peace.—Police Judge.*—In a criminal prosecution begun before a justice of the peace or police judge it is not necessary that the charge be made by indictment or information, but the same may be made by complaint under oath under the provisions of §1694 Burns 1894. *Webber v. Harding, 408.*
2. *Indictment.—Indorsement by Foreman of Grand Jury.*—An indictment which was not indorsed "a true bill" over the signature of the foreman of the grand jury who returned it into court is insufficient. *Denton v. State, 307.*
3. *Embezzlement by Justice of the Peace.—Fines.—Indictment.*—In an indictment against a justice of the peace for the embezzlement of fines collected by him, it is not necessary to negative the provision of the statute that the amount of fines collected by him did not exceed three times the amount he would be entitled to as mileage in making his report. *Crawford v. State, 692.*
4. *Embezzlement by Justice of the Peace.—Indictment.—Demand by Attorney-General.—Deputy.*—No question is presented by a motion to quash an indictment against a justice of the peace for failure to account for fines received by him because of an allegation therein that the demand was made by a person named who was Deputy Attorney-General, since the question as to whether the person named was Deputy Attorney-General was a question of fact to be established at the trial of the cause. *Ib.*
5. *Manslaughter.—Evidence.—Sufficiency.*—Defendant rented to deceased a stall in his barn in which to keep a horse a part of each day. Deceased brought feed for his horse which, without objection from defendant, he kept in that part of the barn where the latter kept his feed. In opening the barn door, deceased had to free a hasp held over a staple by a pin. Defendant, becoming suspicious that deceased was stealing feed, concealed himself in the barn loft and saw him taking it. On the following night defendant shot and mortally wounded deceased while in the act of stealing hay. There was no evidence that defendant's feed was kept in a place that was not openly accessible from the stall rented by deceased. *Held, that the evidence is sufficient to sustain a conviction.* *Bloom v. State, 292.*
6. *Homicide.*—A verdict finding defendant guilty of murder in the second degree will not be disturbed on appeal on the evidence, where it was shown that defendant was sitting in his buggy near the sidewalk engaged in a conversation with another person, and, upon seeing deceased pass along the sidewalk, accosted him with vile language which so angered deceased that he came over to where defendant was sitting, when defendant struck him with a horsewhip and deceased grabbed the whip and struck defendant, whereupon defendant drew a revolver and fired the fatal shot, and when deceased was reeling from the effects of the shot, defendant stood up in his buggy, fired the second shot, and drove away saying that he had fixed or settled him. *Harris v. State, 265.*
7. *Larceny.—Evidence.*—Defendant engaged a horse and buggy at a livery stable to drive to the country to solicit insurance, saying he would return in the evening of that day. He met one of the men he was going to see, and, being informed that the other persons he desired to see were not at home, he drove to a town about forty miles distant, and wrote and mailed the owner of the horse a letter that he would be compelled to remain three or four days. He remained at the town soliciting insurance, put the horse in a livery

CRIMINAL LAW—Continued.

stable, registered at a hotel, and made no effort to conceal his identity, nor to sell the horse, and again wrote the owner of the horse, and fearing he would not receive it as soon as he should, telegraphed, informing him of his whereabouts, and of his being detained, and was arrested on that evening. *Held*, that the evidence was insufficient to support a conviction of defendant of the larceny of the horse and buggy. *Stillwell v. State*, 552.

8. *Admissions.—Harmless Error.*—Error in admitting testimony of admissions of defendant which were obtained by coercion is cured by the defendant testifying to the same facts. *Bloom v. State*, 292.
9. *Impaneling Grand Jury.—Appeal and Error.*—A cause will not be reversed because of the action of the court in denying defendant's motion in arrest of judgment based upon the ground that the record did not show that the grand jury which returned the verdict was duly impaneled, sworn, and charged, where the record showed that the grand jury of the county returned into court the indictment upon which defendant was tried, and that defendant was arraigned thereon and entered a plea of not guilty, without imposing any objection to the impaneling of the jury. *Harris v. State*, 265.
10. *Larceny.—Felonious Intent.*—Where possession of property is obtained by a bailee for hire, a subsequent appropriation of the property by the bailee is not larceny, unless the felonious intent to appropriate it existed in his mind at the time he obtained the possession. *Stillwell v. State*, 552.
11. *Larceny.—Felonious Intent.*—An instruction in a prosecution for larceny that to entitle defendant to an acquittal the jury must be satisfied from the evidence that the felonious intent did not exist is erroneous. *Best v. State*, 46.
12. *Larceny.—Felonious Intent.*—It is not necessary, to constitute the crime of larceny, that the taker should have intended to appropriate the property taken to his own use. *Ib.*
13. *Larceny.—Instruction.—Power of Jury to Fix Penalty.*—Where an indictment in separate counts charges petit and grand larceny an instruction to the jury that if they find the defendant guilty the court will fix the punishment, is erroneous, since the jury might assess the punishment of petit larceny at imprisonment in the county jail, if the same was deemed adequate punishment for the offense. *Caiger v. State*, 646.
14. *Admissions.—Instruction.*—Though, in the trial of a criminal case, the jury "may determine the law for themselves," the court is not invading the province of the jury in stating to them the law as applicable to the facts as sworn to by defendant. *Bloom v. State*, 292.
15. *Instruction.*—The following instruction: "If you find," etc., stating the facts that constitute voluntary manslaughter, "you should find the defendant guilty of voluntary manslaughter," is not erroneous, as being an invasion of the province of the jury. *Ib.*
16. *Instructions.—Record.*—Instructions in a criminal case can only be made a part of the record by a bill of exceptions. *Stillwell v. State*, 552.
17. *Homicide.—Instruction.*—Where, on the trial of one charged with homicide, there was no evidence that would justify a claim that the homicide resulted from an attempt to prevent a burglary,

CRIMINAL LAW—Continued.

an instruction as to the effect of burglary as a defense was error prejudicial to the prosecution, and of which the defendant could not complain. *Bloom v. State*, 292.

18. *Indeterminate Sentence Law*.—The act of February 26, 1897 (Acts • 1897, p. 69), known as the indeterminate sentence law, is valid. *Ib.*
19. *Indeterminate Sentence Law—Verdict*.—A verdict finding defendant guilty of manslaughter is not rendered void because it contains the statement that defendant "is about 55 years old," since the finding of age has relation to the place, not the justice, of the punishment. *Ib.*
20. *Mittimus—Seal*.—The omission of the seal of the court from a mittimus is a mere irregularity, and does not render the mittimus void. *Webber v. Harding*, 408.
21. *Habeas Corpus*.—A mittimus issued pursuant to a judgment rendered by a police judge in a case in which he had jurisdiction of the subject-matter of the action and of the person of the defendant cannot be inquired into by a writ of *habeas corpus*. *Ib.*
22. *Judgment—Collateral Attack—Habeas Corpus*.—Where defendant was convicted and committed to jail he will not be released on a writ of *habeas corpus* because there was neither arraignment nor plea asked or entered before proceeding with the trial, where the court had jurisdiction over the subject-matter and the person of defendant. *Winslow v. Green*, 368.
23. *Prostitution—Judgments—Police Judge*.—A judgment rendered by a police judge, finding defendant guilty of prostitution and fixing her punishment at a fine of \$5 and imprisonment in the county workhouse for twenty days and that she stand committed to the workhouse until such fine should be paid or replevied, was sufficiently certain, and was within the power and jurisdiction of such court under the provisions of §8887 *et seq.*, Burns 1894. *Webber v. Harding*, 408.
24. *Prostitution—Constitutional Law*.—Section 2090 Burns 1894, prohibiting females from living in and frequenting houses of ill fame is not unconstitutional as being an invasion of personal liberty. *Ib.*

DAMAGES—See CARRIERS; MASTER AND SERVANT; RAILROADS.

- For pollution of streams, see **WATERS AND WATER COURSES**; *Weston Paper Co. v. Pope*, 394.
- For failure of landlord to repair leased premises, see **LANDLORD AND TENANT** 3; *Hanson v. Cruse*, 176.
- As to excessive damage in action against city officers for removal of poles and wires of electric light plant, see **JUDGMENTS** 1; *Coverdale v. Edwards*, 374.
- 1. *Personal Injuries—Excessive Damages*.—A judgment for \$15,000 for personal injuries sustained by a passenger in a railroad accident is not excessive, where it was shown that plaintiff received a severe nervous shock which caused a deep seated disease of the nerve centers, injured her spine so that she would suffer from same all of her life, resulting in partial paralysis of her limbs, and that by reason of such injuries she was rendered unfit to perform any

DAMAGES—Continued.

labor, either mental or physical, and was so injured that she could never perform the functions of a wife or mother, and was rendered despondent so as to cast a gloom over her whole life.

Terre Haute, etc., R. Co. v. Sheeks, 74.

2. *Waters and Water Courses.—Pollution.—Riparian Proprietors.*
—In an action by a riparian owner against a manufacturing company for damages for the pollution of a stream, the court was not restricted to the mere depreciation of property in ascertaining the damages, but might take into consideration the inconvenience and discomfort to plaintiffs and their families caused thereby.
Weston Paper Co. v. Pope, 394.

DEATH—As to proper party plaintiff, under §13 of the act of March 2, 1891, for the death of employe of a coal mining company, see **MINES AND MINERALS, 2**; *Maule Coal Co. v. Partenheimer, Adm., 100.*

DECEDENTS' ESTATES—See **DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS.**

Appeal in action to recover assets of estate, See **APPEAL AND ERROR 3**; *Mark v. North, Adm., 575.*

An action may be brought by administrator to set aside assignment of lease made by his decedent in the county in which defendant resides, regardless of the location of the leased premises. See **LANDLORD AND TENANT, 5**; *Ib.*

DEEDS—Cancelation of for fraud, see **CANCELATION OF INSTRUMENTS**; *Sherrin v. Flinn, 422.*

When a deed absolute on its face will be treated as a mortgage, see **MORTGAGES 2, 3, 7**; *Mott v. Fiske, 597*; *Brown v. Follette, 316.*

Execution of deed by children of former marriage to lands descending from their father, purporting to convey complete fee simple title to whole tract, except life estate of widow in an undivided one-third, see **DESCENT AND DISTRIBUTION 1**; *Burget v. Merritt, 143.*

Inchoate interest of wife in lands of husband as a consideration for conveyance to her of other lands in exchange, see **HUSBAND AND WIFE 1, 2**; *Baldwin v. Heil, 682.*

Conveyance of property devised to grantor during life with power to convey without reciting in deed such power, see **WILLS 3**; *Rinkenberger v. Meyer, 152.*

1. *Delivery.*—A grantor executed certain deeds and placed them in an envelope with her name and the words "Deeds to children" indorsed thereon. She kept them in her possession for about two years, and then handed a package containing the deeds to an aged relative who lived with her, and instructed her to take care of the papers until after her death, and then to deliver them to the one who was to settle her estate. She afterward took possession of the package and placed it in a press in her house, saying to the relative, "In case I get sick you take care of these papers, and when I die give

DEEDS—Continued.

them to the one who settles my estate." Soon afterward she became sick and called the relative to her bedside and asked her if she had taken charge of the papers, and being informed that she had, said "All right." The custodian of the package did not know what it contained, but after the death of the grantor delivered the deeds to the grantees therein named. *Held*, that there was no delivery.

Osborne v. Eslinger, 351.

2. *Taxes.—Redemption.—Quieting Title.*—Grantor conveyed certain real estate, retaining a life interest therein. Two years thereafter he conveyed the same real estate to appellee, subject to a life estate, binding appellee to make repairs and pay taxes. The former grantee conveyed the real estate to appellant, who never had possession of the land, but paid the taxes thereon for ten years, when he allowed same to become delinquent, and furnished his brother with money to purchase same at tax sale, which he did, and took the title in his own name, and afterward conveyed the land to appellee, returning part of the purchase money to appellant. All of the deeds were duly recorded within the time allowed by law except the deed to appellee, which was not recorded for sixteen years. The original grantors retained possession of the real estate until a short time before appellant brought suit to quiet title. *Held*, that the tax sale and deed vested the title in appellee, and that the same could not be assailed by appellant.

Wilson v. Carrico, 570.

3. *Life Estate.*—A condition in a deed of general warranty reserving to the grantors an estate for the life of each "with the absolute control of the said real estate, the same as if this conveyance had not been made, for and during the period of the natural life of the grantors," is not inconsistent with the grant in fee contained in the deed.

Haines v. Weirick, 548.

4. *Consideration.—Death of Payee.*—Where by the terms of a deed the consideration was made payable to the grantor's grandson when he should arrive at the age of twenty-one years, and the grandson died before he was twenty-one years of age, his heirs at law were entitled to recover the amount at the time the deceased payee would have become of age had he lived.

Ib.

5. *Record.—Notice.—Quieting Title.—Pleading.*—A complaint in an action to quiet title to real estate as against one claiming title by sheriff's sale, alleging that the husband of plaintiff, having good title to the land in controversy, conveyed it to plaintiff by deed before defendant recovered judgment against the husband, is insufficient, where it was not alleged that plaintiff had her deed recorded within forty-five days, or before the levy and sale, or that defendant had notice of plaintiff's title before it purchased the property.

Union Central Ins. Co. v. Dodds, 365.

DEMURRER—See PLEADING.**DEPOSITIONS—**

- Motions to Suppress.—Irrelevancy.*—Where objections made to a deposition before trial go to the relevancy of the evidence therein, which might become relevant in any possible phase of the case, the court cannot be required to anticipate its propriety or impropriety in advance of its being offered in evidence. If the deposition, or any part thereof, was not relevant when it was offered to be read in evidence, objections thereto at that time should have been interposed. *Terre Haute, etc., R. Co. v. Sheeks, 74.*

DESCENT AND DISTRIBUTION—

1. *Husband and Wife.—Childless Second Wife.—Children by Former Marriage.—Deeds.—Estoppel.*—Under the provisions of §2 of the act of 1889 (Acts 1889, p. 430), children by a former marriage who executed a deed of conveyance during the life of a childless second wife to lands descending from their father, purporting to convey complete fee simple title to the whole tract, except a life estate of the widow in an undivided third thereof, are estopped from claiming title to the one-third interest as the forced heirs of the widow, at her death in 1897, although the deed of conveyance was executed prior to the passage of the act of 1889, and at a time when the law of descent was construed as giving such heirs no present interest in the share of their stepmother in such estate. *Burget v. Merritt, 143.*
2. *Husband and Wife.—Childless Second Wife.—Children by Former Marriage.—Deeds.—Estoppel.—Impairment of Contracts.*—Where children by a former marriage executed a deed of conveyance, during the life of a childless second wife, to lands descending from their father, purporting to convey complete fee simple title thereto, except the life estate of the widow in an undivided one-third, the enforcement of the provisions of §2 of the act of 1889 (Acts 1889, p. 430), enacted subsequently to the execution of the deed, but before the death of the widow, making such deed binding on them when their expectancy was realized, does not amount to an impairment of their contract. *Ib.*

DOMICIL—How domicil of railroad corporation may be determined, see CORPORATIONS, 5, 7; *Eel River R. Co. v. State. ex rel., 433.*

DRAINS—

1. *Remonstrance.—Appeal.—Trial.—Burden of Proof.*—Upon appeal to the circuit court from an order of the board of commissioners establishing a drain, all questions raised by remonstrance before the board are to be tried *de novo*, and the burden is upon the petitioners to establish by evidence such facts as were necessary to be established before the board, if such facts are controverted by remonstrance. *Trittip v. Beaver, 652.*
2. *Remonstrance.*—A remonstrance against the establishment of a drain on the ground that the costs and damages would exceed the benefits presents a legal objection to the proposed work as a whole. *Ib.*
3. *Petition.—Lateral Drains.*—Where the petition for a drain asked for such lateral or branch drains as might be deemed necessary by the drainage commissioners, the proceedings were not invalidated because the commissioners' report provided for lateral drains not expressly designated in the petition. *Goodrich v. Stangland, 279.*
4. *Petition.—Notice.*—Where, by the report of the drainage commissioners on a petition which had been referred to them by the court, it appeared that lands were affected by the drain which were not named in the petition, and the court fixed the time for hearing the report, a notice to the owners of such lands need not, under §5624 Burns 1894, contain a description of the land. *Ib.*
5. *Petition.—Drainage of Lakes.*—Where a petition for a drain did not ask for the drainage of lakes, the fact that the proposed route ran through several small natural water basins did not invalidate the proceedings as being for the drainage of lakes. *Ib.*

DRUGGISTS—

Licenses.—State Board of Pharmacy.—Mandamus.—An action in mandamus will not lie to compel the board of pharmacy to issue an applicant a license without examination or diploma, under the provision of the pharmacy act of 1899 (Acts 1899, p. 159), requiring such board to issue a license to any person who at the time of the taking effect of the act was the proprietor or manager of a store or pharmacy in which physicians' prescriptions were compounded, where the petition showed that the relator became the owner of the pharmacy on June 19, 1899, since such act took effect April 27, 1899.
State, ex rel., v. Indiana Board of Pharmacy, 414.

EASEMENTS—By flowage, see QUIETING TITLE 2; *Indianapolis Water Co. v. Kingan & Co., 476.*

ELECTIONS—

1. *Contests.—Pleading.*—In an action to contest an election the complaint must set forth specifically the particular facts counted upon as invalidating the election. *Borders v. Williams, 36.*
2. *Contests.*—Where in an action to contest an election the issue joined was the failure of the board of canvassers to count all of the votes received by plaintiff in a certain precinct, it was error for the court to admit in evidence and count for plaintiff rejected ballots from another precinct. *Ib.*
3. *Contests.—Pleading.*—An allegation in a complaint in an action to contest an election that the contestor received more votes than the contestee is not the averment of any fact within the purview of the causes for contesting an election as enumerated in §6812 Burns 1894, but is tantamount to a general averment that the judgment of the county board of canvassers was erroneous, and when pleaded as an independent ground of contest will be regarded as surplusage. *Ib.*
4. *Contests.—Ballots.—Distinguishing Marks.*—A cross placed in the square at the left of two candidates for county commissioner in the same district does not constitute a distinguishing mark within the meaning of §§6248c and 6248g Burns' Supp. 1897, and such ballot being regular in other respects should be counted for the candidates for other offices for whom it was properly marked. *Ib.*

EMBEZZLEMENT—Of fines by a justice of the peace, see CRIMINAL LAW, 8; *Crawford v. State, 692.*

1. *Justices of the Peace.—Fines Collected.—Indictment.—Description of Money.*—In an indictment against a justice of the peace for the embezzlement of fines collected by him it was sufficient to describe the sum embezzled as money, simply, without specifying any particular coin, note, bill, or currency. *Crawford v. State, 692.*
2. *Indictment.*—An indictment which charged that defendants, being officers, agents and employes of a bank, and having access to and control and possession of money, appropriated the same to their own use, but not averring that defendants had possession of such money by virtue of their employment, was insufficient to charge embezzlement under §2022 Burns 1894.
State v. Windstandley, 290.

ESTOPPEL—When children by former marriage will be estopped from claiming title to lands as forced heirs of stepmother, see DESCENT AND DISTRIBUTION, 1; *Burget v. Merritt, 143.*

EVIDENCE—Sufficiency of in action for malicious prosecution, see MALICIOUS PROSECUTION, 3; *Hutchinson v. Wenzel*, 49.

Sufficiency of to convict for larceny, see CRIMINAL LAW, 7; *Stillwell v. State*, 552.

Sufficiency of to convict for manslaughter, see CRIMINAL LAW, 5; *Bloom v. State*, 292.

When the admissions of defendant in a criminal case, procured by coercion, are harmless, see CRIMINAL LAW 8; *Ib.*

As to sexual intercourse in prosecution for rape on child under fourteen years of age, see RAPE 5; *Hanes v. State*, 112.

As to intent in prosecution for assault with intent to commit rape, see RAPE 2, 3; *Ib.*

When not necessary to prove all of the allegations of complaint, see PLEADING 5; *Terre Haute, etc., R. Co. v. Sheeks*, 74.

In action to set aside a conveyance of real estate, see FRAUDULENT - CONVEYANCES 1; *Hedrick v. Hall*, 371.

Sufficiency of evidence to establish ownership of land by adverse possession, see ADVERSE POSSESSION 2, 3; *Pittsburgh, etc., R. Co. v. Stickley*, 312.

In trial of action to contest an election, see ELECTIONS 2; *Borders v. Williams*, 36.

When extrinsic evidence is admissible to explain signature to note, see BILLS AND NOTES; *Second Nat. Bank v. Midland Steel Co.*, 581.

1. *Exception.—Offer to Prove.—Appeal and Error.*—An offer to prove made after the ruling of the court excluding the testimony comes too late, and such offer forms no basis for an exception, and is not reviewable on appeal.

State, ex rel., v. Cox, 593; *Rinkenberger v. Meyer*, 152.

2. *Justices of the Peace.—Embezzlement.*—Where in a prosecution against a justice of the peace for the embezzlement of fines collected by him the court limited the investigation of the dockets of the justice given in evidence from the time of last settlement until the date of the demand made by the Attorney-General, and counsel for State read a list of cases from the dockets showing fines assessed and paid in excess of the amount reported by such justice, the jury was warranted in considering such matter as evidence in the absence of any objection made at the time by defendant.

Crawford v. State, 692.

3. *Variance.—Appeal and Error.*—A cause will not be reversed on appeal because of a variance between the note described in the complaint and the one produced at the trial and offered in evidence, where no reason was given at the time why said note was not admissible in evidence.

Allen v. Hollingshead, 178.

EXECUTION SALES—

Appraisement. — Judgment.— Construing §744 Burns 1894 with §585, a judgment without relief cannot rightfully be rendered unless the law provides for such a judgment in the particular case, and if the law does so provide, the judgment must be entered "without relief" or a sale thereunder without appraisement will be illegal.

Bollman v. Gemmill, 33.

EXECUTORS AND ADMINISTRATORS—See DECEDENTS' ESTATES; DESCENT AND DISTRIBUTION.

1. *Sale of Real Estate to Pay Debts.—Contract with Administrator and Heirs for Sale.*—Administrator instituted proceedings to sell real estate to pay debts. A cross-complaint therein was filed setting forth that under an agreement of sale with the administrator and the heirs the cross-complainant took possession of the real estate and made valuable improvements thereon, and asking that cross-complainant be given a first lien on the proceeds of the sale for the value of the improvements. *Held*, that the cross-complaint did not state a cause of action. *Moore v. Moore*, 261.
2. *Accounts.—Decedent's Estates.—Complaint.*—A complaint disclosing that defendant had in his possession money and property belonging to the estate of decedent to which plaintiff, as administratrix, was entitled, a demand, and the refusal of defendant to account, is sufficient to entitle plaintiff to an accounting. *Shrum, Adm., v. Simpson*, 160.

EXEMPTIONS—A conveyance will not be set aside as fraudulent against creditors, where the value of the land conveyed did not exceed the amount to which the grantor was entitled as exempt from execution. *Hedrick v. Hall*, 371.

FORFEITURES—Of franchise of railroad company for surrendering corporate property to rival company, see RAILROADS 1, 2, 3, 4; *Eel River R. Co. v. State, ex rel.*, 433.

FRANCHISES—See MUNICIPAL CORPORATIONS.

Forfeiture of franchise of railroad company for surrendering corporate property to rival company, see RAILROADS 1, 2, 3, 4; *Eel River R. Co. v. State ex rel.*, 433.

Discriminating charges of gas company in furnishing gas to the public under franchise of city, see GAS; *Richmond Nat. Gas Co. v. Clawson*, 659.

FRAUDULENT CONVEYANCES—Conveyance to wife in lieu of her inchoate interest in lands of husband, see HUSBAND AND WIFE, 2; *Baldwin v. Heil*, 683.

1. *Evidence.*—A conveyance of real estate will not be set aside as fraudulent as against creditors, where the evidence showed that the conveyance was made upon a valuable consideration, and that the grantee took the same without knowledge of any intended fraud. *Hedrick v. Hall*, 371.
2. *Exemption.*—A conveyance of real estate will not be set aside as fraudulent against creditors, where the value of the land conveyed did not exceed the amount to which the grantor was entitled as exempt from execution. *Ib.*

GAME—

1. *Constitutional Law.*—Section 2209 Burns 1894, making it unlawful for any person to have in his possession any quail during the close season, as therein provided, is not violative of the fourteenth amendment to the United States Constitution which provides that no state shall make or enforce any law which shall de-

GAME—Continued.

prive any person of property without due process of law, nor of article 1, §21 of the State Constitution which provides that no man's property shall be taken by law without just compensation.

Smith v. State, 611.

2. *Possession of Game Taken in Open Season.*—Under the provision of §2209 Burns 1894, one having in his possession quail during the close season, as therein provided, is liable to punishment therefor, although the quail came into his possession during the open season. *Ib.*

GAMING—When action by State to suppress gambling house will not lie, see **INJUNCTION**, 2; *State v. O'Leary, 526.*

GAS—See **MINES AND MINERALS**; **NATURAL GAS**.

Discriminating Charges.—Enforcement.—A rule promulgated by a natural gas company engaged in furnishing gas to the public under a franchise of a city fixing the price of gas to consumers at twelve and one-half cents per thousand cubic feet when used for fuel purposes only, and, when used by consumers for both fuel and illuminating purposes, at twenty cents per thousand cubic feet for both purposes, unjustly discriminates against customers who use gas for both purposes, and cannot be enforced.

Richmond Nat. Gas Co. v. Clawson, 659.

GRAND JURY—The defendant in a criminal case, by entering a plea of guilty, waives his right to question the manner in which the grand jury was impaneled. See **CRIMINAL LAW**, 9; *Harris v. State, 265.*

GRAVEL ROADS—

Injunction.—Counties.—An action will not lie to enjoin the board of county commissioners from letting a contract, under the provisions of §§6924-6933 Burns Supp. 1897, for the construction of a free gravel road, because of irregularities in the election, since an adequate legal remedy is given by §7859 Burns 1894, granting an appeal from the action of the board of commissioners in such cases.

Board, etc., v. Conner, 484.

GUARDIAN AND WARD—

Failure of Guardian to Account.—Action on Bond.—Limitations.—

An action by a ward to recover on his guardian's bond for failure of guardian to account for moneys received, such failure being due to fraud or mistake, is barred after three years from final settlement.

State, ex rel., v. Parsons, 67.

HABEAS CORPUS—When mittimus issued pursuant to judgment of police judge cannot be inquired into by, see **CRIMINAL LAW** 21, *Webber v. Harding, 408.*

When prisoner will not be released on writ of *habeas corpus* because neither arraignment nor plea was entered before trial, see **CRIMINAL LAW** 22; *Winslow v. Green, 368.*

HARMLESS ERROR—Sustaining demurrer to answer, see **APPEAL AND ERROR** 44; *Coverdale v. Edwards, 374.*

Pleading.—Available error cannot be predicated on the action of the court in sustaining a demurrer to an answer where the facts averred in the answer were admissible in evidence under the general denial.

Troxel v. Thomas, 519.

HEALTH—

1. *State Board of Health. — Power to adopt Rules of Health. — Police Power. — Constitutional Law. —* Section 6711 *et seq.* Burns 1894 authorizing and empowering the State board of health to adopt rules and by-laws to prevent the spread of contagious and infectious diseases is not a delegation of legislative authority in violation of article 4, §1 of the Constitution vesting the legislative authority of the State in the General Assembly. *Blue v. Beach, 121.*
2. *Boards of Health. — Schools. — Vaccination of School Children. —* Under the provision of §6718 Burns 1894 making it the duty of local boards of health to protect the public health and arrest the spread of contagious diseases, a local board of health may require that school children be vaccinated as a sanitary condition imposed upon their privilege of attending school during a period of threatened epidemic of smallpox. *Ib.*

HIGHWAYS—See GRAVEL ROADS.

Statutes must be strictly followed in the establishment of, see COUNTIES, 2; *Helms v. Bell, 502.*

A railroad is not a public highway in the sense that lands acquired for right of way cannot be taken from it by adverse possession. See ADVERSE POSSESSION, 1; *Pittsburgh, etc., R. Co. v. Stickley, 312.*

Establishment. — When Partially Within City Limits. — Where, in a proceeding to establish a highway, before the act of 1899 (Acts 1899, p. 116) came into effect, it appeared that a part of the proposed highway lay within the corporate limits of a city, the court, on appeal from the board of commissioners establishing the highway, erred in overruling a motion to dismiss the petition, since the board had no jurisdiction of that part of the proposed highway within the city limits. *Gascho v. Sohl, 417.*

HOMICIDE—See CRIMINAL LAW.

Sufficiency of evidence, see CRIMINAL LAW 6; *Harris v. State, 265.*

1. *Indictment. — Where Death was Caused in Manner Unknown to Grand Jury. —* Where the evidence before the grand jury points to the commission of a murder by the accused, but from such evidence they are in doubt as to the cause of death, a count may be framed alleging that the death was caused in some manner to them unknown. *Waggoner v. State, 341.*
2. *Indictment. — Allegation of Assault. —* In an indictment for murder, it is not necessary to charge, in formal and express terms, an assault or an assault and battery. *Ib.*

HUSBAND AND WIFE—Construction of statutes relating to conveyances made by children whose father left surviving him a childless second wife, see STATUTES, 3; *Burget v. Merritt, 143.*

When in suit to foreclose a mortgage executed by husband and wife on lands of husband, it is not necessary to set up her inchoate right to one-third of the lands mortgaged, as against judgment creditors, see JUDGMENTS 2; *Clements v. Davis, 624.*

When terms of will are such as not to require wife to make election, see WILLS 1; *Cameron v. Parish, 329.*

HUSBAND AND WIFE—Continued.

Inchoate interest of wife in action to foreclose mortgage on lands of husband, see PLEADING 6; *Clements v. Davis*, 624.

1. *Inchoate Interest of Wife.—Deeds —Consideration.*—The surrender by a wife of her inchoate interest in the lands of her husband constitutes a valuable consideration for the conveyance to her of other property by way of compensation for the interest so surrendered and conveyed by her. *Baldwin v. Heil*, 682.
2. *Conveyance to Wife in Lieu of her Inchoate Interest.—Fraudulent Conveyances.*—A conveyance of real estate to a wife in exchange for real estate owned by her husband, made in lieu of her inchoate interest therein, will not be set aside, at the instance of creditors, as fraudulent, where it was shown that the land owned by the husband was worth \$9,820, subject to a mortgage debt of \$4,500, and the property conveyed to the wife was of the value of \$2,400. *Ib.*

INDETERMINATE SENTENCE LAW—Constitutionality of, see CRIMINAL LAW, 18; *Bloom v. State*, 292.

INDIANAPOLIS CITY CHARTER—See MUNICIPAL CORPORATIONS.

The provisions of the Indianapolis city charter relative to street improvements are not in violation of the federal or State Constitution. See MUNICIPAL CORPORATIONS, 7; *City of Indianapolis v. Holt*, 222.

The debts of the school city of Indianapolis and those of the civil corporation not to be aggregated to determine the debt limit. See MUNICIPAL CORPORATIONS, 1; *Campbell v. City of Indianapolis*, 186.

Constitutionality of act of March 4, 1899, authorizing organization of board of school commissioners, see CONSTITUTIONAL LAW, 2, 3, 4; *Campbell v. City of Indianapolis*, 186.

INDICTMENT—Must be indorsed "a true bill" over the signature of the foreman of the grand jury. See CRIMINAL LAW, 2; *Denton v. State*, 307.

Sufficiency of indictment for embezzlement, see EMBEZZLEMENT, 2; *State v. Winstandley*, 290.

Description of money in indictment against justice of the peace for embezzling fines collected, see EMBEZZLEMENT, 1; *Crawford v. State*, 692.

Where death was caused in manner unknown to grand jury, see HOMICIDE, 1; *Waggoner v. State*, 341.

For murder need not charge in express terms an assault or an assault and battery. See HOMICIDE, 2; *Ib.*

INJUNCTION—When action will lie to enjoin the owner of lands from using artificial means to increase the flow of natural gas, see MINES AND MINERALS, 1; *Manufacturers Gas. etc., Co. v. Indiana Nat. Gas. etc., Co.*, 461.

INJUNCTION—Continued.

An action to enjoin defendant from transporting natural gas through pipes at a pressure exceeding 800 pounds per square inch, in violation of law, cannot be maintained, where it is not shown that plaintiffs sustain any special injury thereby peculiar to themselves. See **NATURAL GAS**, 2; *Manufacturers Gas, etc., Co. v. Indiana Nat. Gas, etc., Co.*, 566.

As to injunction to prevent enforcement of contract made by county to investigate county offices, see **COUNTIES**, 5, 6, 7; *Board, etc., v. Gardner*, 165.

To enjoin the letting of a contract for the construction of a free gravel road, see **GRAVEL ROADS**; *Board, etc., v. Conner*, 484.

When order of court in an injunction proceeding cannot be appealed from, see **APPEAL AND ERROR**, 2; *Terre Haute, etc., R. Co. v. St. Joseph, etc., R. Co.*, 27.

1. *Landlord and Tenant.—Enforcement of Covenants in Lease.*—Where a covenant was inserted in a lease prohibiting the lessee from selling beer upon the leased premises other than that manufactured by a certain brewing company, the company for whose benefit the contract was made may enforce such provision by injunction, the remedy at law being inadequate.

Ferris v. American Brewing Co. 539.

2. *Gaming.—Criminal Law.*—An injunction will not be granted at the instance of the State to suppress a gambling house, where the gambling house was located out upon a prairie almost a quarter of a mile distant from any house, and it was not shown that any person had been annoyed or disturbed, or any property injured.

State v. O'Leary, 526.

3. *Legal Remedy. — Counties. — Contracts of Employment. — Accounts.*—An action by a taxpayer will not lie to enjoin the county commissioners from entering into a contract employing a person to prepare an index to certain county records, since §7858 Burns 1894, provides an adequate legal remedy.

Tackett v. Stevenson, 407.

INSTRUCTIONS—In a criminal case are made part of the record only by bill of exceptions. See **CRIMINAL LAW** 16; *Stillwell v. State*, 552.

Joint Assignment on appeal, see **APPEAL AND ERROR** 19; *Crawford v. State*, 692.

As to intent in prosecution for assault and battery with intent to commit rape, see **RAPE** 4; *Hanes v. State* 112.

1. *Refusal to Give.—Appeal and Error.*—A cause will not be reversed because of the action of the court in refusing to give an instruction where it does not affirmatively appear from the record that the instruction was tendered before the commencement of the argument with a request that it be given. *Harris v. State*, 265.
2. *Evidence.*—A cause will not be reversed on the ground that certain instructions given were not applicable to the evidence, where there was some evidence to which the instructions complained of were applicable. *Ib.*

INSTRUCTIONS—Continued.

3. *Reasonable Doubt.—Criminal Law.—Harmless Error.*—A criminal cause will not be reversed because of a defective instruction on the question of reasonable doubt, where the charge was not impressed with affirmative error, but was incomplete or obscure, and the court was not requested to give an instruction embracing a more complete exposition of the law relative to the question, and it is not shown that the complainant was prejudiced to any extent in any of his substantial rights. *Ib.*
4. *Malice.—Criminal Law.*—An instruction that malice as used in the statutes defining murder has a technical meaning, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive, that it is not confined to ill will toward one or more individual persons, but is used and intended to denote an action growing from any wicked or corrupt motive—a thing done with bad or malicious intent—where the fact has been attended by such circumstances as carry in them the plain indication of a heart regardless of social duty, and fatally bent on mischief, is a proper definition of malice, and the further statement therein that “malice is implied from any deliberate and cruel act against another, however sudden,” was not erroneous as invading the province of the jury. *Ib.*
5. *Malice.—Criminal Law.*—Where in a prosecution for murder it was shown that after defendant had fired the fatal shot and the deceased had staggered and retreated from twenty to forty feet and ceased to make any demonstration or effort to inflict injury, that defendant stood up in his buggy and deliberately fired another shot at deceased, it was not error to instruct the jury that they might consider the circumstances of the firing of the second shot along with other circumstances as tending to show malice in the mind of defendant. *Ib.*
6. *Hypothetical Statement.*—The rule that a hypothetical instruction must contain a statement of all of the material facts which the evidence reasonably tends to prove applies only to the substantive and controlling facts, and not to the subsidiary and evidentiary facts. *Hutchinson v. Wenzel, 49.*

INSURANCE—A stipulation in a mortgage that the mortgagor should “keep the buildings insured to the amount of — thousand dollars” is incomplete, and is not binding on the mortgagor. See **MORTGAGES 11**; *McCaslin v. Advance Mfg. Co., 298.*

JUDGES—Action will not lie to compel the judge of a trial court to sign a bill of exceptions, where it is apparent from the bill that it cannot benefit the person applying for it. See **MANDAMUS, 8**; *State, ex rel., v. Cox, 593.*

JUDGMENTS—Without relief, see **EXECUTION SALES**; *Bollman v. Gemmill, 33.*

Action will not lie to have judgment of justice of the peace rendered void. See **JUSTICES OF THE PEACE, 1**; *Calvert v. Hendricks, 592.*

1. *Excessive Damages.*—A judgment against the city marshal and members of the common council for damages in the sum of \$4,000 in favor of an electric light company for the removal of its poles and wires from the street, was excessive, where the city had the

JUDGMENTS—Continued.

right to remove the poles, since the measure of damages was the difference in value between the poles and wires properly removed and as they were actually removed. *Coverdale v. Edwards*, 374.

2. *Foreclosure of Mortgages.—Husband and Wife.—General Judgment Creditors of Husband.—Inchoate Interest of Wife.—Judicial Sales.*—In a suit to foreclose a mortgage executed by husband and wife on the lands of the husband, to which suit general creditors of the husband are made defendants, and to which the wife is a party, it is not necessary that the wife should set up her inchoate right to the one-third of the lands mortgaged, or the proceeds of their sale, as against the judgment creditors, and she will not be concluded by a judgment directing the sale of the land, and the application of the proceeds, after the payment of the mortgage debt, to the discharge of the general judgments against her husband, where her interest in the land was not specifically put in issue.

Clements v. Davis, 624.

JUDICIAL NOTICE—The Supreme Court takes judicial notice of the terms of circuit courts. *Taylor v. Canaday, Rec.*, 617.

Deputy Attorney-General.—Courts will not take judicial notice of the official character of the deputies or assistants of the Attorney-General. *Crawford v. State*, 692.

JURISDICTION—When question of jurisdiction is waived, see **ABATEMENT**; *Eel River R. Co. v. State, ex rel.*, 433.

JURY—Telegram to juror during trial of cause, see **TRIAL** 1; *Harris v. State*, 265.

1. *Competency of Juror.—Officers.—Criminal Law.*—Sheriffs have such pecuniary interest in securing convictions in criminal cases as to render their deputies incompetent to serve as jurors in a criminal case. *Gaff v. State*, 277.
2. *Competency of Juror.—Challenge for Cause.—Criminal Law.*—Although §1862 Burns 1894 professes to give all the grounds of challenge for cause, the constitutional guaranty of an impartial jury will not be allowed to be destroyed by the legislature's omission of grounds that clearly render the juror incompetent. *Ib.*
3. *Talesmen.—Deputy Sheriffs as Jurors.—New Trial.—Criminal Law.*—Where, after trial and conviction, it appeared that two of the jurors called as talesmen were deputy sheriffs of the county, such fact being unknown to defendant or his attorneys until after the verdict, the defendant was entitled to a new trial. *Ib.*

JUSTICES OF THE PEACE—Indictment of for embezzlement of fines, see **CRIMINAL LAW** 3; *Crawford v. State*, 692.

Prosecution before need not be by indictment or information. See **CRIMINAL LAW** 1; *Webber v. Harding*, 408.

Description of money in indictment against justice of the peace for embezzlement of fines collected by him, see **EMBEZZLEMENT**, 1; *Crawford v. State*, 692.

1. *Judgments.—Injunction.*—An action can not be maintained to have a judgment rendered by a justice of the peace declared void, and to enjoin the issuance of an execution thereon, because of

JUSTICES OF THE PEACE—Continued.

irregularities, since the statute granting an appeal furnishes an adequate legal remedy. *Calvert v. Hendricks*, 592.

2. *Embezzlement.—Failure to Account for Fines Collected.*—Where the Deputy Attorney-General examined the dockets of a justice of the peace and failed to ascertain the correct amount of fines collected because of false entries made by such justice, such justice was as much guilty of embezzlement in failing to pay over the fines in excess of the amounts entered on his docket and demanded by the Deputy Attorney-General as if he had refused to pay over the amounts entered on the docket and demanded. *Crawford v. State*, 692.

LACHES—Delay of sixteen months after action has accrued in applying for writ of mandate to compel a county treasurer to pay an order on a particular fund will not alone defeat the action. See **MANDAMUS**, 8; *Wood, Treas., v. State, ex rel.*, 1.

LANDLORD AND TENANT—Covenant in lease prohibiting lessee from selling beer, upon the leased premises, other than that manufactured by a certain brewing company, see **INJUNCTION**, 1; *Ferris v. American Brewing Co.*, 539.

An agreement between landlord and tenant by which each furnish a portion of seed, implements, and stock, and that the products shall be divided at the end of term, does not create a partnership. See **CONTRACTS**; *Shrum, Adm., v. Simpson*, 160.

1. *Covenant as to Use of Leased Premises.—Public Policy.*—A covenant in a lease that the lessee should sell no beer upon the leased premises except that manufactured by a certain brewing company is not invalid as being against public policy. *Ferris v. American Brewing Co.*, 539.
2. *Covenant as to Use of Leased Premises.—Enforcement.—Parties.*—A covenant in a lease that lessee should sell no beer upon the leased premises except that manufactured by a certain brewing company may be enforced by the company for whose benefit the contract was made, although the company was not a party thereto. *Ib.*
3. *Failure to Make Repairs.—Damages.*—Damages cannot be recovered by a tenant for personal injuries resulting from the mere continuance of obvious defects to a house occupied by him which the landlord agreed to repair. *Hanson v. Cruse*, 176.
4. *Repairs.—Habitability of Premises.*—The relation of landlord and tenant raises neither an implied warranty of habitability nor an obligation to repair on the landlord's part. *Ib.*
5. *Lease.—Decedents' Estates.—Courts.—Jurisdiction.*—A lease of lands for a term of years is personal property, the title to which, upon the death of the holder, passes to his administrator, and an action may be brought by the administrator in the county in which defendant resides to set aside an assignment of the lease made by his decedent, regardless of the location of the leased premises.

LARCENY—See **CRIMINAL LAW**. *Mark v. North, Adm.*, 575.

Sufficiency of evidence, see **CRIMINAL LAW** 7; *Stillwell v. State*, 552. When appropriation of property obtained by bailee for hire is not larceny, see **CRIMINAL LAW** 10; *Ib.*

As to power of jury to fix penalty, under the indeterminate sentence law, see **CRIMINAL LAW** 13; *Caiger v. State*, 646.

LAW OF CASE—

Counties.—Removal of County Seat.—Taxation.—A decision of the Supreme Court in an appeal from a judgment requiring the board of commissioners to order an election under a special act for the relocation of a county seat, holding the provisions of the act for raising revenue valid, is not the law of a new and independent action brought to compel the commissioners to order another election under such act, and its validity as a precedent is subject to review on appeal in such subsequent action.

Board, etc., v. State, ex rel., 604.

LEASE—Of railroad to rival company in order to destroy competition, see **RAILROADS** 1, 2, 3, 4; *Eel River R. Co. v. State, ex rel., 433.*

LICENSES—Action to compel board of pharmacy to issue an applicant a license without examination, see **DRUGGISTS**; *State, ex rel., v. Indiana Board of Pharmacy, 414.*

1. *Electric Light Companies.—Municipal Corporations.*—A grant to an electric light company to plant and erect poles in the streets of a city for the purpose of furnishing electric lights to the citizens of such city, reserving the right on the part of the city to revoke the grant, and demand that the poles be removed, and remove the same if necessary, constituted a bare license, revocable without cause at the will of the city council. *Coverdale v. Edwards, 374.*
2. *Electric Light Companies. — Municipal Corporations.*—The provision of §4303 Burns 1894, authorizing cities to grant by resolution or ordinance, under such restrictions as the common council may deem proper, to any person or corporation, the right to maintain in the streets, alleys, and other public places in such city, poles, wires, and other necessary appliances for the purpose of supplying electric or other light, carries with it the right to impose any terms on the grant not forbidden by law, and the discretion of the common council is not confined to the mere restriction of methods of use, but extends to restriction of time. *Id.*

LIFE ESTATES—A condition in a deed of general warranty reserving to the grantors a life estate in the lands not inconsistent with the grant in fee, see **DEEDS** 3; *Haines v. Weirick, 548.*

With power to convey under certain circumstances, see **WILLS** 3, 4, 5; *Rinkenberger v. Meyer, 152.*

LIMITATION OF ACTIONS—Action on guardian's bond, see **GUARDIAN AND WARD**; *State, ex rel., v. Parsons, 67.*

Mere lapse of time will not bar the right to assert and show that a deed absolute on its face was intended as a mortgage, where the parties claiming title under the deed never occupied the land. See **MORTGAGES** 1; *Mott v. Fiske, 597.*

Statute Does Not Apply to State.—The statute of limitations does not, in civil actions, apply to the State.

Eel River R. Co. v. State, ex rel., 433.

MALICIOUS PROSECUTION—

1. *Probable Cause.—Instruction.*—Where defendant caused plaintiff to be prosecuted for uttering a forged note upon receipt of a letter from the alleged maker denying the execution of the note, an instruction in an action against defendant for malicious prosecution to the effect that if defendant believed the statement contained in the letter to be true, and had no knowledge or information of any fact which would cause a man of reasonable intelligence or caution to doubt or disbelieve the statement, then there was probable cause for the prosecution, and the verdict should be for defendant, was properly refused. *Hutchinson v. Wenzel*, 49.
2. *Probable Cause.—Instructions.*—Probable cause does not depend upon the guilt or innocence of the plaintiff, but upon appearances deduced from facts known to the defendant, and information received by him, and properly investigated, of a character to produce in the mind of a reasonably prudent and cautious person the honest belief that the crime charged had been committed, and an instruction in an action for malicious prosecution to the effect that if the evidence preponderates in favor of the defendant, and establishes the crime charged, the defendant then had the right to institute the criminal proceeding against plaintiff, was erroneous, as the jury might reasonably infer therefrom that the only defense, so far as probable cause was concerned, was proof that the plaintiff was actually guilty of the crime for which he was prosecuted. *Ib.*
3. *Evidence.—Sufficiency.*—In the trial of an action for malicious prosecution it was shown that plaintiff sold defendant a note purporting to have been executed by plaintiff's brother-in-law, a non-resident of the State; that plaintiff and defendant had resided in the same city for a number of years and plaintiff's reputation for honesty and integrity was good, but the alleged maker of the note was unknown to defendant. When the note matured defendant wrote the maker requesting payment, and was informed by letter that the note was a forgery, whereupon he sent an officer for plaintiff, who gave a minute detail of the transaction out of which the note was given, and offered to give defendant security in double the amount of the note until the validity thereof could be verified; but that defendant in disregard of plaintiff's statement and offer, and without advising with the prosecuting attorney, who was present, and against the advice of the chief of police, filed an affidavit against plaintiff charging him with uttering a forged note, upon which a warrant was issued and he was taken into custody. An indictment was subsequently returned against plaintiff, charging him with the offense, but a *nolle prosequi* was entered for the reason that the maker of the note had appeared before the grand jury and testified that the note was genuine. *Held*, that the evidence was sufficient to support a judgment for plaintiff. *Ib.*

MANDAMUS—

1. *Alternative Writ.—Joinder of Issues.*—The right to an alternative writ of mandate may exist independently of the ability to prove it, and the fact that a county order was indorsed as paid will not defeat an action for an alternative writ of mandate to require the county treasurer to pay the order, since under the provision of §1185 Burns 1894 issues of law and fact may be joined as in civil cases. *Wood, Treas, v. State, ex rel.*, 1.

MANDAMUS—Continued.

2. *Alternative Writ.—Joinder of Issues.*—In an action for an alternative writ of mandate to require a county treasurer to pay a balance alleged to be due on an order on the State school fund, an answer, by defendant that the order was marked paid by his successor and deposited with the county auditor as a canceled order, that payment was asserted on one side, and denied on the other, as to such alleged balance, and that defendant could not safely pay same until the amount unpaid, if any, was first determined, in an action for that purpose, constitutes a complete defense to such proceeding. *Ib.*
8. *Laches.*—The mere delay of sixteen months after the action accrued in applying for a writ of mandate to compel a county treasurer to pay an order on a particular fund cannot be considered unreasonable, or laches of such a character as will alone defeat the action. *Ib.*
4. *Pleading.—Argumentative Denial.*—An answer in a mandamus proceeding to require a county treasurer to pay a balance alleged to be due upon an order on a particular fund, traversing the averment of the complaint that such sum, or any sum, was unpaid upon the order, and also that the money liable for the payment was in the treasury at the time the demand was made, was good as an argumentative denial, and, in the absence of a general denial, a demurrer thereto was properly overruled. *Ib.*
5. *County Treasurer.—Demand.*—Where in an action against a county treasurer for an alternative writ of mandate to require the payment of an order, the term of the treasurer against whom the action was brought expired and his successor was substituted as the party defendant, the petition need not allege a prior demand upon the substituted defendant. *Ib.*
6. *Evidence.—County Treasurer.—County Order.*—In the trial of an action for a writ of mandate requiring a county treasurer to pay a balance alleged to be due upon an order on a particular fund, the court erred in excluding the testimony of a witness tending to prove that there was no money in the treasury at the time demand for payment was made that could be used in payment thereof. *Ib.*
7. *Evidence.—Presumption.—County Treasurer.*—In an action for a writ of mandate to require a county treasurer to pay a balance alleged to be due upon a county order on a particular fund, it cannot be conclusively presumed against a successor in office that the money remained in the treasury until paid out according to law. *Ib.*
8. *Bill of Exceptions.—Defects.*—An action will not lie to compel the judge of a trial court to sign a bill of exceptions, where it is apparent from the bill that it cannot benefit the person applying for it, or would be useless if signed. *State, ex rel., v. Cox, 593.*
9. *Bill of Exceptions.—Presumption.*—In an action in mandamus to require a trial judge to sign a bill of exceptions tendered him, all presumptions are in favor of the action of the court, and, in the absence of the evidence given at the hearing of the motion, it will be presumed that the action of the trial court was correct. *Ib.*

MANSLAUGHTER—See CRIMINAL LAW.

Sufficiency of evidence, see CRIMINAL LAW 5; *Bloom v. State, 292.*

MANUFACTURES—Liability for discharging waste matter into streams, see **WATERS AND WATER COURSES**; *Weston Paper Co. v. Pope*, 394.

MASTER AND SERVANT—See **CARRIERS**; **RAILROADS**.

Personal Injuries.—Knowledge of Danger.—Plaintiff was employed in defendant's tin-plate factory in operating a plating machine, and, while passing a vat filled with oil which was used in connection with the machine, his foot slipped on the oily floor and he was thereby thrown into the vat of boiling oil and severely injured. It was shown by the special verdict that defendant's servants, who had been in its employ but a few weeks, had spilled the oil on the floor and had covered it with sawdust; that plaintiff had been in the service of the defendant, operating the plating machine for about two months and knew of the practice of using sawdust to absorb oil that had been spilled upon the floor. *Held*, that the condition of the floor and the open vat were as well known to the plaintiff as to defendant, and that plaintiff cannot recover for the injuries received.

Hattaway v. Atlanta Steel, etc., Co., 507.

MINES AND MINERALS—See **GAS**; **NATURAL GAS**.

1. *Natural Gas.—Property Rights.—Increasing Natural Flow.—Injunction.*—Natural gas in the ground is so far the subject of property rights in the owners of the superincumbent lands, that, while each of them has the right to bore or mine for it on his own land, and to use such portion of it as, when left to the natural laws of flowage, may rise in the wells of such owner and into his pipes, no one of the owners of such lands has the right, without the consent of all the other owners, to induce an unnatural flow into or through his own well, or to do any act with reference to the common reservoir, and the body of gas therein, injurious to, or calculated to destroy it, and an action may be maintained by the owners of superincumbent lands to enjoin another owner from using devices for pumping, or any other artificial process, that shall have the effect of increasing the natural flow of gas.

Manufacturers Gas, etc., Co. v. Indiana Nat. Gas, etc., Co., 461.

2. *Death by Wrongful Act.—Action.—Parties.—Damages.*—Under the provision of the act of 1891 (Acts 1891, p. 57) relating to coal mines, vesting the right of action for the recovery for the death of an employe in certain persons therein named, the administrator of a deceased employe of a coal mining company, operated under the provisions of said act, cannot maintain an action for the death of such employe, caused by an explosion of gas in the mine, although decedent was employed therein as a blacksmith at the time of the accident, and was not engaged in actually mining coal.

Maule Coal Co. v. Partenheimer, Adm., 100.

MONOPOLIES—Lease of railroad to rival company in order to destroy competition, see **RAILROADS** 1, 2, 3, 4; *Eel River R. Co. v. State, ex rel.*, 433.

MORTGAGES—

1. *Deeds.—Limitation of Actions.*—Where a deed absolute on its face was intended as a mortgage, and the persons claiming title thereunder never occupied the land, a mere lapse of time will not bar the right to assert and show that the deed was in fact a mortgage, in defense of an action to enforce the rights of the parties under such deed.

Mott v. Fiske, 597.

MORTGAGES—Continued.

2. *Deeds.—Special Finding.*—A finding in a partition proceeding that on and prior to the date of a certain deed upon which plaintiff's title to the real estate in question depended the grantor was indebted to the grantee for borrowed money and said deed was executed as security for the same, but without the knowledge of grantee, was sufficient to support a conclusion of law treating the deed as a mortgage when considered in connection with the further finding that the grantee took the deed as security for said indebtedness. *Ib.*
3. *Deeds.—Evidence.*—A deed, although absolute on its face, will be treated as a mortgage if in fact it was received as security for the repayment of money, and evidence, written or oral, is admissible to show such facts. *Ib.*
4. *Delivery.—Deeds.—Priority.*—One of the makers of a promissory note authorized the payee thereof to procure a loan for her from a person named, agreeing to execute a mortgage upon certain real estate and pay the proceeds thereof upon the note. The payee thereafter called at her residence with a note and mortgage which she executed and gave to the payee, who credited the amount thereof upon the note held by him, and, the next day, delivered the note and mortgage to the mortgagee, who gave him a check for the amount and filed the mortgage for record in the recorder's office of the county. Immediately after signing the mortgage the mortgagor signed and acknowledged a deed conveying the mortgaged premises to her step-granddaughter, who was a joint maker of the first note. *Held*, that the delivery of the mortgage was complete and effectual, and *eo instanti* became a valid lien upon the land.
Merritt v. Temple, 497.
5. *Trust Deeds.—Interest.—Usury.*—Plaintiff, in order to secure an advancement made by defendant, caused certain real estate to be conveyed to him by warranty deed, absolute on its face, but intended as a mortgage as security for the payment of the advancement. *Held*, that an agreement to pay the lump sum of \$10,000 over and above the legal rate of interest for the loan was usurious and void, under §7046 Burns 1894. *Brown v. Follette, 316.*
6. *Trust Deeds.—Complaint.*—A complaint in an action to have a deed declared a mortgage, and for an accounting, alleging that certain real estate was conveyed to defendant to secure the payment of money advanced by him for plaintiff, and that defendant claims to be the absolute owner of the land, is not bad for failing to allege a tender of the amount due defendant, or plaintiff's ability and readiness to perform the conditions of the contract upon her part. *Ib.*
7. *Trust Deeds.—Evidence.*—Where real estate is transferred as the mere security for a debt, no matter by what form of conveyance, the transferee takes merely as a mortgagee, and has no other right or remedy, and parol evidence is admissible to show that a deed absolute on its face was intended to be a mortgage only. *Ib.*
8. *Trust Deeds.—Complaint.*—Where in an action to have a deed declared a mortgage, and for an accounting, the complaint alleging that a bank after foreclosing a mortgage on certain lands which plaintiff formerly owned, and on which she held a second mortgage, agreed with plaintiff that if she would pay and secure its claim within a certain time it would deed her the land, and that she afterward entered into a contract with defendant to furnish the money to pay the bank and take and hold the land in his own name

MORTGAGES—Continued.

as security, but that defendant afterward claimed to be the absolute owner of the real estate and refused to surrender the same to defendant, is not bad for failing to allege that defendant had notice of plaintiff's contract with the bank at the time he accepted the deed and that she had performed all of the conditions of such contract, or because it was not disclosed by the complaint that plaintiff had a mortgageable interest in the land. *Ib.*

9. *Liens.—Contracts.*—The holder of a lien upon real estate surrendered the same in order that the owner might make a larger loan thereon with a building and loan association. The association entered into a written agreement that after the payment of "all mechanics' and other liens, which have been or may be hereafter filed against the property described in the mortgage, * * * and when said buildings are fully completed, and all material and labor fully paid," any sum remaining should be paid to the holder of the original lien. After the payment of the liens, there remained the sum of \$800.39, which the association paid to the mortgagor. *Held*, in an action by the association to foreclose its mortgage, that the original lien holder was entitled to recover on a cross-complaint the amount paid by the association to the mortgagor.

People's, etc., Assn. v. Carey, 324.

10. *Priority.*—M. sold to A. certain real estate on which was located a factory building. the purchaser agreeing to assume the payment of a mortgage thereon, one of the requirements of such mortgage being that the property should be kept insured for the benefit of the mortgagee. The purchaser gave to M. a mortgage for a portion of the purchase money, in which there was a provision authorizing the purchaser to pay off the first mortgage and place a new mortgage on the property for the same sum, which should be prior to the purchase-money mortgage executed to M. Afterwards the building burned, and the first mortgage was paid from the proceeds of the insurance. Thereafter A. mortgaged the property to D. for a sum equal to the amount of the first mortgage, and used the proceeds thereof in the erection of new buildings. After the fire, and before the mortgage to D. was executed, M. began suit and filed *lis pendens* notice. *Held*, that D's mortgage was prior and superior to that of M.

McCaslin v. Advance Mfg. Co., 298.

11. *Insurance for Benefit of Mortgagee.*—A provision in a mortgage that the mortgagor shall keep the buildings on the real estate covered by the mortgage insured for the benefit of the mortgagee, "to the amount of — thousand dollars" is incomplete, and does not bind the mortgagor to insure the property for any amount. *Ib.*

MOTIONS—How made part of record on appeal, see **APPEAL AND ERROR**, 30, 31; *Allen v. Hollingshead, 178.*

To modify special finding, see **SPECIAL FINDING**, 2; *Ib.*

To suppress deposition on account of irrelevancy, see **DEPOSITIONS**; *Terre Haute, etc., R. Co. v. Sheeks, 74.*

Appeal and Error.—The action of the court in sustaining a motion for judgment in favor of defendant will not be disturbed on appeal because of a defect in the form of the motion where a correct result was reached. *Hattaway v. Atlanta Steel, etc., Co., 507.*

MUNICIPAL CORPORATIONS—Railroads are not authorized by statute to lay their tracks longitudinally in the streets of a city, see RAILROADS, 6; *Town of New Castle v. Lake Erie, etc., R. Co.*, 18.

When occupation of streets of a city by a railroad company raises the presumption of a grant, see RAILROADS, 5; *Ib.*

Grant to electric light company, see LICENSES 1, 2; *Coverdale v. Edwards*, 374.

When judgment against city marshal and members of the common council for removal of poles and wire of electric light plant is excessive, see JUDGMENTS 1; *Ib.*

1. *School City of Indianapolis.—Debt Limit.*—The debts of the school city of Indianapolis and those of the civil corporation are not to be aggregated to determine the debt limit to which either is entitled under the Constitution, and the right or power of either of these corporations to contract an indebtedness not in excess of the limit fixed by the Constitution is affected only by its own existing debts. *Campbell v. City of Indianapolis*, 186.
2. *Municipal Indebtedness.—Lease of Building for City Purposes.*—A lease of a building by a city, to be used as a city hall, does not create an indebtedness for the aggregate sum of all the annual payments of rent to become due; and, therefore, where it appears that the current revenues of the city will be amply sufficient to meet the accruing rent, such contract is not invalid, though the city's constitutional debt limit has already been reached. *City of South Bend v. Reynolds*, 70.
3. *Indebtedness.*—If the indebtedness of a city equals or exceeds the constitutional limit, and the current revenues are not sufficient to pay such indebtedness when it comes into existence, including other expenses for which the city is liable, an indebtedness is thereby created, and the Constitution is violated. *Ib.*
4. *Taxation.—Search for Omitted Property.—Contracts.*—The duty of searching for secreted property is not imposed upon the tax officers of a city, and a city may, under the general power to levy and collect taxes upon all property subject to taxation, contract with a private person to search for property secreted and omitted from the tax duplicate. *City of Richmond v. Dickinson*, 345.
5. *Railroads.—Occupation of Streets.*—Municipal corporations, under their general powers, have authority to grant railroad companies the right to lay their tracks longitudinally upon a street, provided that the use does not destroy or unreasonably impair the street as a highway for the general public. *Town of New Castle v. Lake Erie, etc., R. Co.*, 18.
6. *Street Improvements.—Assessment —Front-Foot Rule.—Indianapolis Charter.*—The assessment for street improvements by the front-foot rule, as provided by §74 of the act of 1895 (Acts 1895 p. 384), is to be treated as *prima facie* correct, but is not exclusive of the right to have an assessment made according to benefits. *City of Indianapolis v. Holt*, 222.
7. *Street Improvements.—Constitutional Law.—Indianapolis Charter.*—The provisions of the act of 1891, as amended by the act of 1895 (Acts 1891 p. 137, Acts 1895 p. 384), relative to street improvements in cities having a population of more than 100,000 inhabitants, are not violative of articles 5 and 14 of the amendments of the United States Constitution, or §21 of the Bill of

MUNICIPAL CORPORATIONS—Continued.

Rights of the Constitution of the State of Indiana, as authorizing the taking of private property for public use without due process of law, and without just compensation therefor, since §78 of said act gives the property owner the right to be heard, and §75 furnishes an additional safeguard by requiring liens for street improvements to be enforced only by suit to foreclose in a court of competent jurisdiction, and authorizes the owner, who has not signed a waiver, to contest in such suit the amount of his assessment. *Ib.*

8. *Street Improvements.—Injunction.*—An action will not lie to enjoin a city from proceeding with a street improvement because of a statement in the declaratory resolution that the city will assess the total cost of the improvement against the abutting property without reference to the question of benefits, where the resolution provided that the improvement should be made under the provisions of the act of 1889 (Acts 1889, p. 237), known as the Barrett law, which gives to the abutting property owner the right to be heard before a tribunal empowered, and in duty bound, to adjust all questioned assessments to the basis of actual special benefits received by the improvement.

Taylor v. City of Crawfordsville, 403.

9. *Licenses.—Cancellation. — Removal of Electric Light Poles from Street.*—Where, by the terms of a grant to an electric light company to occupy the streets of a city, the common council thereof had authority to terminate the license at will, the failure of the company to remove its poles on receiving legal notice from the council so to do, rendered them a nuisance *per se*, and the city had the right to remove them summarily. *Coverdale v. Edwards, 374.*

10. *Resolutions.—Motives of Council.*—In an action against city officers for damages for removing plaintiff's electric light poles and wires from the streets, the motives or influences that led the councilmen to pass the resolution ordering such removal were irrelevant where the subject-matter was within the scope of their authority. *Ib.*

11. *Resolutions.—Preamble.*—The preamble of a resolution may be looked to in aid of the interpretation of an ambiguity in the resolution, but, if the terms of the resolution are clear, the preamble cannot be allowed to cast a doubt upon the meaning. *Ib.*

NATURAL GAS—See GAS; MINES AND MINERALS.

1. *Transportation from State. — Interstate Commerce.— Constitutional Law.*—The act of 1889 (Acts 1889, p. 369), in so far as it attempts to prohibit the owner of natural gas from transporting the same by safe methods out of the State, contravenes the federal Constitution relating to interstate commerce, and is void, since natural gas, when reduced to possession, is an article of commerce.

Manufacturers, Gas, etc., Co. v. Indiana Nat. Gas, etc., Co., 545.

2. *Transportation. — Injunction. — Complaint. — Parties.*—A complaint to enjoin defendant from transporting natural gas through pipes at a pressure exceeding 300 pounds per square inch, in violation of the provisions of the act of 1891 (Acts 1891 p. 89), is insufficient where it is not shown that plaintiffs sustain any special injury peculiar to themselves by reason of the violation of the act, aside from, and independent of, the general injury to the public.

Manufacturers Gas, etc., Co. v. Indiana Nat. Gas, etc., Co., 566.

NEGLIGENCE—See CARRIERS; CONTRIBUTORY NEGLIGENCE; RAILROADS.

NEW TRIAL—

Special Finding.—The fact that some of the findings made by the court are not sustained by sufficient evidence is no ground for a new trial, if such findings are not necessary to sustain the conclusions of law. *McCaslin v. Advance Mfg. Co.*, 298.

NOTICE—Notice to an agent is notice to the principal of any matter that is within the scope of the agency.

Marion Mfg. Co. v. Harding, 649.

OFFICERS—See ATTORNEY-GENERAL; COUNTY TREASURER.

A deputy sheriff is incompetent to serve as juror. See JURY, 1, 8; *Gaff v. State*, 277.

As to contract for investigation of county offices, see COUNTIES 5: *Board, etc., v. Gardner*, 165.

1. *Impeachment.—Appeal and Error.—Joint Assignment.*—In a proceeding to impeach a public officer, under the act of 1897 (Acts 1897 p. 278), the person who verifies the accusation is not a party to the proceeding, and an assignment of error by the State, on appeal from the action of the court in sustaining a demurrer to the accusation, made jointly with the person who verified the accusation, presents no question. *In Re Paskins*, 173.

2. *Deputies.—Attorney-General.—Prosecution of Justice of the Peace for Embezzlement.—Demand by Deputy Attorney-General.*—In a prosecution against a justice of the peace for the embezzlement of fines collected by him and demanded by a deputy of the Attorney-General, defendant cannot question the right of the Attorney-General to have two deputies, since there is nothing in the law creating the office of Attorney-General and prescribing his duties which fixes the number of his deputies.

Crawford v. State, 692.

OVERRULED CASES—*John v. Bradbury*, 97 Ind. 263, see *Cameron v. Parish*, 336.

Prather v. Ross, 17 Ind. 495; *Kendall v. Morton*, 21 Ind. 205; *Wiley v. Shank*, 4 Blackf. 420; *Mears v. Graham*, 8 Blackf. 144; *Hays v. Crutcher*, 54 Ind. 260; *Williams v. Second Nat. Bank*, 83 Ind. 237; *Willson v. Nicholson*, 61 Ind. 241; *Hayes v. Brubaker*, 65 Ind. 27; *Avery v. Dougherty*, 102 Ind. 443; *Hobbs v. Cowden*, 20 Ind. 310; *Jackson School Tp. v. Farlow*, 75 Ind. 118, see *Second Nat. Bank v. Midland Steel Co.*, 581.

Denton v. Thompson, 136 Ind. 446; *Wilson v. Talley*, 144 Ind. 74; *Steele v. Empson*, 142 Ind. 397, see *Trittip v. Beaver*, 652.

Board, etc., v. State, ex rel., 147 Ind. 476, see *Board, etc., v. State, ex rel.*, 604.

PARTIES—Designation of parties in assignments of error by initials of Christian names, see APPEAL AND ERROR 8; *Goodrich v. Stangland*, 279.

As to who is proper party plaintiff in an action for death by wrongful act, under act of March 2, 1891, see MINES AND MINERALS, 2; *Maule Coal Co. v. Partenheimer, Adm.*, 100.

PARTIES—Continued.

In action to enjoin gas company from transporting gas through pipes at a high pressure in violation of law, see **NATURAL GAS**, 2; *Manufacturers, etc., Gas Co. v. Indiana Nat. Gas, etc., Co.*, 566.
 Cannot be substituted during time granted for filing a petition for a rehearing, see **APPEAL AND ERROR** 7; *Maule Coal Co. v. Partnerheimer, Adm.*, 100.

1. *Prosecuting Attorney as Relator.—Change of Venue.*—Where a prosecuting attorney files an information in the nature of a *quo warranto* in the proper county, on his own relation, such prosecuting attorney remains the attorney, though the venue is changed to another county. *Eel River R. Co. v. State, ex rel.*, 433.

2. *Cancellation of Instruments.*—A and B executed a note and secured same by a mortgage on a tile mill owned by them jointly. A purchased the interest of B in the mill and assumed and agreed to pay the note, but became insolvent and sold the mill to C and D, and, as a part consideration, took the note of the purchasers, payable when the note and mortgage on the mill were paid and satisfied. C sold his interest in the mill to D, who assumed all liability as to the last mentioned note. The mortgagee foreclosed the mortgage, and D, in order to protect his title in the mortgaged property, purchased the judgment. *Held*, that B and D had such a common interest as entitled them to join as plaintiffs in an action to cancel the note held by A and have the amount thereof applied upon the judgment. *Troxel v. Thomas*, 519.

PARTITION—

Attorney's Fees.—Where defendants in a partition proceeding appeared by counsel and resisted the petition, it was error to tax them with fees of the attorneys of their adversary.

Osborne v. Eslinger, 351.

PARTNERSHIP—When agreement between landlord and tenant does not amount to, see **CONTRACTS**; *Shrum, Adm., v. Simpson*, 160.

PAYMENT—Of consideration in deed where the payment was to be made to a person when he should arrive at the age of twenty-one years and payee died before he was of that of age, see **DEEDS**, 4; *Haines v. Weirick*, 548.

PHARMACY—See **DRUGGISTS**.

PLEADING—See **MANDAMUS**.

In action to quiet title, see **QUIETING TITLE**, 1; *Sherrin v. Flinn*, 422.

In action to contest election, see **ELECTIONS** 1, 3; *Borders v. Williams*, 36.

Sufficiency of complaint in action to have a deed declared a mortgage, see **MORTGAGES**, 6, 8; *Brown v. Follette*, 316.

Sufficiency of complaint by receiver to show authority to bring suit, see **RECEIVERS**; *Taylor v. Canaday, Rec.*, 671.

Sufficiency of answer in an action for breach of warranty of machinery sold, see **SALES**, 3; *Reeves & Co. v. Byers*, 535.

In action to compel a railroad company to remove its tracks from a street, see **RAILROADS**, 7; *Town of New Castle v. Lake Erie, etc., R. Co.* 18.

PLEADING—Continued.

In action by administrator to recover possession of money and property belonging to estate, see EXECUTORS AND ADMINISTRATORS, 2; *Shrum, Adm., v. Simpson*, 160.

When demurrer was addressed to the alternative writ instead of the writ and petition, see APPEAL AND ERROR, 45; *State ex rel. v. Indiana Board of Pharmacy*, 414.

Pleas in abatement and in bar, see ABATEMENT; *Eel River R. Co. v. State ex rel.* 433.

1. *Municipal Corporations.—Street Improvements.*—The sufficiency of a complaint attacking the validity of a statute and a street improvement resolution based thereon must be determined by reference to the provisions of the statute, and not by the character of its averments concerning the resolution.

City of Indianapolis v. Holt, 222.

2. *Theory.*—A complaint to set aside an assignment of a lease on the ground of unsoundness of mind of assignor is not rendered bad because of averments contained therein as to weakness of mind and fraud.

Mark v. North, Adm., 575.

3. *Death by Wrongful Act.—Action.—Complaint.—Railroads.*—A complaint against a railroad company for damages for the death of plaintiff's decedent is not bad on demurrer for failing to allege that actual damages were sustained, where the complaint alleged that decedent left surviving him his wife and an infant son.

Chicago, etc., R. Co. v. Thomas, Adm., 634.

4. *Cancellation of Instruments.—Return of Consideration.*—A complaint to set aside an assignment of a lease on account of the unsoundness of the mind of the assignor, disclosing that assignor, after the assignment, went and lived with assignee until her death, is not bad for failing to aver an offer to restore to the defendant the value of the decedent's maintenance, where it was alleged that the assignment was made wholly without consideration.

Mark v. North, Adm., 575.

5. *Complaint. — Proof. — Recovery. — Secundum Allegata et Probata.* — Where the gravamen of a paragraph of complaint was that plaintiff was injured by the derailment of defendant's passenger train, upon which she was a passenger, caused by a broken rail in a certain switch, in the construction of which defendant was guilty of negligence, proof of the substance of the material issues constituting the cause of action as set out in the complaint is sufficient to sustain a judgment for plaintiff, without proof of all the particular infirmities or deficiencies alleged in the complaint relative to the construction and maintenance of the switch.

Terre Haute, etc., R. Co. v. Sheeks, 74.

6. *Foreclosure of Mortgages.—Judgment Creditors.—Husband and Wife.—Inchoate Interest of Wife.*—Where in an action to foreclose a mortgage the only averment as to the mortgagor's wife was that she joined in the execution of the mortgage, and the answer of judgment creditors, who were made defendants, admitted the averments of the complaint, and asked that their interests be protected and that any surplus of the proceeds of the sale of the mortgaged premises be applied on their judgment, no issue was thereby raised which required the wife to assert her inchoate interest in the real estate or in the proceeds of its sale.

Clements v. Davis, 624.

7. *Defective Demurrer.—Appeal and Error.*—Sustaining a defective demurrer is not reversible error where the pleading demurred to was bad.

Bollman v. Gemmill 33; *Hanson v. Cruse* 176.

POLICE JUDGE—Jurisdiction of in the trial of one charged with prostitution, see **CRIMINAL LAW**, 28; *Webber v. Harding*, 408.

POLICE POWER—To prevent the spread of contagious diseases, see **HEALTH**; *Blue v. Beach*, 121.

POOR—When action cannot be maintained by State under county council act of 1899 to compel county officers to make an appropriation for aid to school children of indigent parents. See **SCHOOLS**, 1; *Shelby County Council v. State, ex rel.*, 216.

PRACTICE—Motions to modify a special finding are not recognized by the code of procedure. See **SPECIAL FINDING**, 2; *Allen v. Hollingshead*, 178.

Sustaining a defective demurrer is not reversible error where the pleading demurred to was bad. *Bollman v. Gemmill*, 33; *Hanson v. Cruse*, 176.

Special Finding.—Amendment.—The court may amend the special finding of facts during the term in which the judgment was rendered and after overruling a motion for a new trial.

Marion Mfg. Co. v. Harding, 648.

PRINCIPAL AND AGENT—

Notice.—Notice to an agent is notice to the principal of any matter that is within the scope of the agency.

Marion Mfg. Co. v. Harding, 648.

PRINCIPAL AND SURETY—Action on forfeited recognizance, see **RECOGNIZANCES** 1, 2, 3; *State v. Osborn*, 385.

PRIORITIES—Of mortgage, see **MORTGAGES** 4, 10; *Merritt v. Temple*, 497; *McCaslin v. Advance Mfg. Co.*, 298.

PROCESS—Service of against a domestic railroad company, see **CORPORATIONS**, 6; *Eel River R. Co. v. State, ex rel.*, 433.

PROSECUTING ATTORNEY—As relator in *quo warranto* proceeding on change of venue, see **PARTIES** 1; *Eel River R. Co. v. State, ex rel.*, 433.

PROSTITUTION—Sufficiency of judgment by police judge fixing fine and work-house sentence, see **CRIMINAL LAW**, 28; *Webber v. Harding*, 408.

Section 2090 Burns 1894, prohibiting females from living in houses of ill fame is constitutional. See **CRIMINAL LAW**, 24; *Ib.*

QUAERE—

Are not taxpayers of a township who have no children of school age entitled to be enumerated as patrons or voters of a particular school selected by them? Has §15 of the general school law of 1865 (Acts 1865 p. 3) been repealed? *Carnahan, Tr., v. State, ex rel.*, 156.

QUIETING TITLE—By cancelation of deeds for fraud, see **CANCELATION OF INSTRUMENTS**; *Sherrin v. Flinn*, 422.

QUIETING TITLE—Continued.

1. *Damages.—Complaint.*—The fact that damages were claimed for the use of the land, and on account of the cutting and removal of the timber therefrom, did not render an action to set aside a deed of conveyance to the land and quiet the title thereto any less an action to quiet title. *Ib.*
2. *Eminent Domain.—Easements.—User.—Canals.—Riparian Owners.*—In the construction of a canal from Broad Ripple to Indianapolis, under the acts of 1835 and 1836 (Acts 1835, p. 25, Acts 1836, pp. 14, 15), the board of internal improvements built a dam across White river and constructed a levee along the bank, extending up the river about a mile. The dam set back the water for a distance of more than four miles, and widened the river on each side more than thirty feet, on an average, and boats loaded with grain or wood were occasionally taken from the canal through the locks onto the river above the dam, and thence poled to various points. Plaintiff, a riparian owner, brought suit against defendant, who had succeeded to the rights of the canal, to quiet title; defendant produced proof of a continuous flowage since 1838. *Held*, that user by flowage evidenced no broader claim than a right of flowage, and that such a right is a mere easement.
Indianapolis Water Co. v. Kingan & Co, 476.

QUO WARRANTO—Sufficiency of information in action to forfeit franchise of railroad company, see **RAILROADS**, 2; *Eel River, R. Co. v. State, ex rel.*, 433.

RAILROADS—See **CARRIERS**; **CONTRIBUTORY NEGLIGENCE**.

Right of way may be taken by adverse possession, see **ADVERSE POSSESSION** 1; *Pittsburgh, etc., R. Co. v. Stickley*, 312.

How domicil of may be determined, see **CORPORATIONS** 5; *Eel River R. Co. v. State, ex rel.*, 433.

Municipal corporations have authority to grant railroad companies the right to lay tracks longitudinally upon a street. See **MUNICIPAL CORPORATIONS**, 5; *Town of New Castle v. Lake Erie, etc., R. Co.*, 18.

1. *Lease of Corporate Property to Rival Company.—Effect of Second Lease of Like Character.*—Where a railroad company leased its corporate property and franchises to a rival company in order to destroy competition, and afterwards a new lease of like character and for a like purpose was executed to the same company, the second lease had the effect of a new and substantive violation of the duties and obligations of the lessor.
Eel River R. Co. v. State, ex rel., 433.
2. *Forfeiture of Franchises.—Quo Warranto.—Sufficiency of Information.*—In proceedings by the State in the nature of a *quo warranto* against a domestic railroad company to declare a forfeiture of its franchises on the ground that it has ceased to engage in the business for which it was organized, and has surrendered its corporate property and franchises to a rival company in order to destroy competition, the information need not aver that the acts complained of were prohibited by statute, or that public injury resulted therefrom. *Ib.*

RAILROADS—Continued.

3. *Leasing of Competing Road.—Statute Construed.*—Under the act of March 8, 1865 (§§5209-5215 Burns 1894), authorizing railroad companies to lease intersecting and continuous lines, a railroad company is not permitted to surrender the control of its corporate property under a lease in perpetuity to a competing company operating a parallel road. *Ib.*
4. *Forfeiture of Franchise.—Receiver.*—In an action in the nature of a *quo warranto* against a railroad company to declare a forfeiture of its franchises, the court, in rendering judgment against such company, is authorized to appoint a receiver where it is asked for in the information. *Ib.*
5. *Occupation of Streets.—Adverse Possession.—Presumption.—Municipal Corporations.*—The occupation of the streets of a municipality by a railroad company with its tracks for a period of thirty years under such circumstances as to amount to adverse possession raises the presumption of a grant.
Town of New Castle v. Lake Erie, etc., R. Co., 18.
6. *Occupation of Streets.—Municipal Corporations.*—Section 5153 Burns 1894 relating to the general powers of railroad companies to construct their roads does not authorize such companies to lay their tracks longitudinally upon the streets of a municipality without its consent or over its objection. *Ib.*
7. *Occupation of Streets.—Removal.—Municipal Corporations.—Pleading.*—In an action by a town to compel a railroad company to remove its tracks from a street, an answer that defendant had used the tracks complained of by leave and license of the town for more than thirty years, and had expended large sums of money in building, maintaining, and equipping the same, with full knowledge and consent of plaintiff, is not bad for failure to justify the use of the tracks for switching, yard, and storage purposes, where the complaint does not show any use of the street for switching, yard, and storage purposes that would necessarily be unlawful, except on the basis that defendant had no right in the street at all. *Ib.*
8. *Injury at Crossing.—Contributory Negligence.*—One who attempts to drive over a railway crossing without looking for approaching trains is guilty of contributory negligence, although the view was so obstructed that he could not see approaching trains without going in advance of his team, and the fact that the persons in charge of a train approaching the crossing failed to sound the whistle and ring the bell, as required by law, did not excuse him from the exercise of the caution and vigilance demanded by the known perils of the crossing.
Chicago, etc., R. Co. v. Thomas, Adm., 634.

RAPE—

1. *Assault and Battery.—Consent.*—Any touching of the person of a female child under the age of fourteen years with intent to perpetrate upon her the act of sexual intercourse, whether forcibly and against her will, or with the voluntary submission of the child, constitutes an assault and battery within the meaning of the statute, since the child can give no consent that would make the act lawful.
Hanes v. State, 112.
2. *Intent.—Evidence.—Reasonable Doubt.*—Where defendant dominated by libidinous passion met a girl under the age of consent with whom he had been seeking interviews, and, in the

RAPE—Continued.

seclusion of a barn, took indecent liberties with her person in the prosecution of the arts of the seducer, the fact that he did not accomplish sexual intercourse, or employ greater force, is not inconsistent with a design to win her by lustful blandishments, and that he failed in the latter course does not disprove his criminal intent, nor raise a reasonable doubt as to his intention. *Ib.*

3. *Assault and Battery.—Evidence.—Intent.*—In a prosecution for an assault and battery upon a girl under the age of consent, with intent to commit rape, it was shown that defendant, a man of mature years, and of bad moral character, followed after the girl on two or three occasions as she went into the country on errands, and on one of these occasions asked her when he could see her; that he afterward followed her into a barn, took hold of her, felt her breasts and limbs, tried to raise her clothes and throw her down, and when she tried to get away told her that he would not hurt her, and told her she was the sweetest little girl in town, and to wait a minute. *Held*, that the evidence was sufficient to support a verdict finding defendant guilty of an assault and battery with intent to commit rape. *Ib.*

4. *Instructions.—Intent.*—An instruction in a prosecution for assault and battery with intent to commit rape that if the jury were satisfied beyond a reasonable doubt that the defendant took hold of the prosecuting witness, it was for them to say whether or not, under all the circumstances, the intention to have intercourse with the girl was then in his mind, and that it was with that purpose, and with that intention in his mind that he laid hands upon her, is not erroneous as suggesting that any particular facts would warrant a particular inference. *Ib.*

5. *Evidence.—Instructions.*—In a prosecution for an assault and battery with intent to commit rape it was shown that defendant, a man of lecherous disposition, met the prosecuting witness in a barn and took indecent liberties with her person; that he had been following the girl about for several days, attempted to make arrangements to see her privately, and had on a previous occasion met her in the barn. *Held*, that such facts reasonably tended to prove cohabitation, and were sufficient to warrant an instruction that if the jury believed from the evidence that defendant had sexual intercourse with the prosecuting witness the State's case would be made out, although the defendant denied that he had sexual intercourse with the prosecuting witness, and the evidence of the prosecuting witness was equivalent to a denial thereof. *Ib.*

RECEIVERS—Court may appoint receiver for railroad company, upon rendering judgment declaring a forfeiture of its franchise, see **RAILROADS**, 4; *Eel River R. Co. v. State, ex rel.*, 433.

Authority to Sue.—Complaint.—In an action by a receiver to enjoin the collection of certain promissory notes, the complaint alleged that plaintiff was appointed receiver in the court where the suit was brought, in an action within the court's jurisdiction, and that in the order of his appointment was commanded to reduce to his possession all the property, rights, credits, and choses in action, and as such receiver to prosecute in his own name all actions necessary in the discharge of his duties. *Held*, that the complaint exhibited sufficient authority in the receiver to bring the suit. *Taylor v. Canaday, Rec.*, 671.

RECOGNIZANCE—

1. *Action Against Sureties.—Defense.—Indictment in Another County.*
—In an action against the sureties on the forfeited recognizance of one charged with a felony, it is no defense that the accused had been indicted for the same offense in another county.
State v. Osborn, 385.
2. *Action on Forfeited Recognizance.—Insufficiency of Affidavit.*—
The insufficiency of an affidavit and information, in that they failed to show that the person whose name was signed to the jurat was an officer authorized to administer oaths, is no defense to an action on a forfeited recognizance. *Ib.*
3. *Action on Forfeited Recognizance.—Defense.*—In an action against the sureties on a forfeited recognizance, it is no defense that the State, in attempting to arrest the accused on an indictment in another county for the same crime, caused the accused to conceal himself so that the sureties were unable to perform their obligation. *Ib.*

ROADS—See GRAVEL ROADS; HIGHWAYS.

SALES—

1. *Warranty.—Action for Purchase Price of Machinery.*—Where the seller of threshing machinery agreed with the purchaser that if the machinery did not do good work after a fair trial he would take it back and surrender the notes, and the machinery after a fair trial failed to do good work, the seller cannot maintain an action on the notes.
Marion Mfg. Co. v. Harding, 648.
2. *Warranties.*—Where an engine was sold under a written warranty to do as good work as any other machinery of the same size, manufactured for a like purpose, there can be no implied warranty that the engine will do the work for which it was sold and purchased.
Reeves & Co. v. Byers, 535.
3. *Warranties.—Breach.—Pleading.*—In an action on a promissory note given for the purchase price of an engine, sold under a written warranty that it would do "as good or better, and as fast or faster, work as other machinery of the same size, and manufactured for a like purpose," an answer alleging that the engine did not do "as good or better, and as fast or faster, work as any other machinery of the same size, manufactured for a like purpose, and that it did not do satisfactorily the work for which it was intended," was insufficient, where it was not alleged that the engine was manufactured for the purpose of doing any of the kind of work for which it was alleged that defendant used same, and the size of the engine and the purpose for which it was manufactured were not shown. *Ib.*

SCHOOLS—See INDIANAPOLIS CITY CHARTER; MUNICIPAL CORPORATIONS; *Quaere.*

Vaccination of school children as a sanitary condition imposed upon their privilege of attending school during a period of threatened epidemic of smallpox, see HEALTH, 2; *Blue v. Beach, 121.*

County not liable for acts of its treasurer in the handling of State school funds. See COUNTIES, 4; *Wood, Treas., v. State ex rel. 1.*

Act of March 4, 1899, concerning schools in cities of 100,000 inhabitants is constitutional. See CONSTITUTIONAL LAW, 2; *Campbell v. City of Indianapolis, 186.*

SCHOOLS—Continued.

Act of March 3, 1871, authorizing the organization of a board of school commissioners for city of Indianapolis is unconstitutional.

See CONSTITUTIONAL LAW, 1; *Ib.*

1. *Indigent Children.—Aid by County.—Mandamus.*—An action cannot be maintained by the State on the relation of a school city to compel the county commissioners to make an appropriation for the benefit of indigent children under the act of 1899 (Acts 1899 p. 547), where the school city had furnished no temporary aid and had filed no list with county auditor of children aided.

Shelby County Council v. State, ex rel., 216.

2. *Removal of Schoolhouse.*—The expediency of changing a school-house site is not to be determined by the superintendent alone, under the provisions of the act of 1893 (Acts 1893 p. 17), but with his opinion must concur that of the trustee and a majority of the patrons of the school, and whether the facts exist that warrant the superintendent in ordering a removal is a question that is properly open to judicial investigation. *Carnahan, Tr., v. State, ex rel., 156.*

SEAL—The omission of the seal of the court from a mittimus is a mere irregularity, and does not render the mittimus void. See CRIMINAL LAW, 20; *Webber v. Harding, 404.*

SIGNATURES—When extrinsic evidence is admissible to explain signature to note, see BILLS AND NOTES; *Second Nat. Bank v. Midland Steel Co., 581.*

SPECIAL FINDING—See TRIAL.

Amendment by court during the term, see PRACTICE; *Marion Mfg. Co. v. Harding, 648.*

When not bad as stating a conclusion of law, see TRIAL, 5; *Taylor v. Canaday, Rec., 671.*

When some of the findings are not sustained by sufficient evidence, see NEW TRIAL; *McCaslin v. Advance Mfg. Co., 298.*

Remedy where judgment on special finding would not conform to the conclusion of law, see APPEAL AND ERROR 40; *Allen v. Hollingshead, 178.*

A conclusion of law erroneously included in the special finding of facts will be disregarded on appeal. *Baldwin v. Heil, 682.*

1. *Pleading.—Husband and Wife.*—A conclusion of law in an action to foreclose a mortgage is not erroneous as to defendant because of the failure of the special finding to show that she was the wife of her codefendant, as alleged in the complaint, where she joined with her husband in a general denial which stated that they were husband and wife, and no answer was filed denying that they were husband and wife. *Allen v. Hollingshead, 178.*

2. *Motions.—Practice.*—Motions to modify a special finding, or to make additional findings, are not recognized by the code of procedure, and such motions are properly overruled, rejected or stricken out by the court. *Ib.*

3. *Harmless Error.*—In an action on promissory notes given for the purchase price of machinery in which it was determined that plaintiff take nothing by the action, a conclusion of law that defendant was entitled to a cancelation of the notes and a release of the mortgage was not reversible error because of the

SPECIAL FINDING—Continued.

fact that no cross-complaint was filed asking for their cancelation, since plaintiff was not harmed by being compelled to surrender notes which could not be enforced. *Marion Mfg. Co. v. Harding*, 648.

4. *Conclusion of Law.*—The insertion in the special finding of facts by the trial court in an action on a note that the amount due, including interest and attorney's fees, was \$500, was not objectionable as a conclusion of law included in the finding of facts, since such statement was a finding of fact, and not a conclusion of law.

Baldwin v. Heil, 682.

SPECIAL VERDICT—

Personal Injuries.—*Aggravation of Injuries by Negligence of Plaintiff.*—A special verdict in an action for personal injuries need not affirmatively show that the injuries received were not subsequently aggravated by any negligent conduct on the part of plaintiff.

Terre Haute, etc., R. Co. v. Sheeks, 74.

STATUTES—See CONSTITUTIONAL LAW.

1. *Re-enactment.*—*Construction.*—Where a statute has been construed by the courts of the State, and the same is substantially reënacted, the legislature adopts such construction, unless the contrary is clearly shown by the language of the act.

Board, etc., v. Conner, 484.

2. *Subject-Matter.*—*Title.*—*Mines and Minerals.*—*Constitutional Law.*—The act of 1891 (Acts 1891, p. 57) regulating the operation of coal mines and vesting the right of action for the recovery for the death of an employe in certain persons, is not invalid as embracing more than one subject and matters properly connected therewith, nor because of its failure to express the subject of the act in the title thereof, under the provision of article 4, §19 of the State Constitution that "every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title." *Maule Coal Co. v. Partenheimer, Adm.*, 100.

3. *Husband and Wife.*—*Childless Second Wife.*—*Children by Former Marriage.*—*Deeds.*—Sections 2, 3 and 4 of the act of 1889 (Acts 1889 p. 430), relating to conveyances made by children whose father left surviving him a childless second wife, form a complete statute in themselves, and the subject-matter of such sections is clearly expressed in the title thereof. *Burget v. Merritt*, 143.

STATUTORY CONSTRUCTION — Re-enacted Statute, see STATUTES, 1; *Board, etc., v. Conner*, 485.

For table of statutes cited and construed see page xxvii.

TAXATION—City may contract with a private person to search for property secreted and omitted from the tax duplicate. See **MUNICIPAL CORPORATIONS**, 4; *City of Richmond v. Dickinson*, 345.

Constitutional Law.—*Counties.*—*Removal of County Seats.*—The provision of the act of 1895 (Acts 1895, p. 217) for the relocation of the county seat of Jackson county requiring the levy and collection of a special tax in the township in which the county seat should be located, to provide funds for erection of the buildings, is in conflict with the general law of the State pertaining to counties, and is in contravention of article 4, §2 of the Constitution which provides that the General Assembly shall not pass local or special laws "for the assessment and collection of taxes for State, county, or road purposes," and also violates article 10, §1 of the Constitution, requiring uniformity and equality of taxation.

Board, etc., v. State, ex rel., 604.

TRIAL—See INSTRUCTIONS; MOTIONS; SPECIAL FINDING; SPECIAL VERDICT.

- A deputy sheriff is incompetent to serve as juror. See JURY, 1, 8; *Gaff v. State*, 277.

Burden of proof in appeal from board of commissioners in drainage proceeding, see DRAINS, 1; *Trittipo v. Beaver*, 652.

Sufficiency of record entry to show submission and trial of cause, see APPEAL AND ERROR, 37; *Troxel v. Thomas*, 519.

1. *Jury.—Telegram to Juror.—Criminal Law.*—A cause will not be reversed because of the action of the court in informing one of the jurors in the presence and hearing of the other jurors that he had a telegram for him from his wife, and that he had answered it, telling her that her husband would be home as soon as the trial was concluded, where the nature of the telegram is not disclosed by the record. *Harris v. State*, 265.
2. *Misconduct of Juror.—Appeal.*—Where misconduct of a juror was alleged in a motion for a new trial, and the evidence thereof as presented to the trial court was conflicting, such evidence will not be reviewed on appeal. *Bloom v. State*, 292.
3. *Change of Judge.—Appeal.*—The general rule that the denial of an application for a change of judge cannot be considered on appeal, unless it is first presented in a motion for a new trial, is not applicable where the change was sought in an action in which judgment was rendered by default. *Goodrich v. Stangland*, 279.
4. *Change of Judge.—Waiver.*—Where a motion to strike out a remonstrance to a proposed drain had been heard and submitted, the remonstrant thereby waived his right to apply for a change of judge. *Ib.*
5. *Special Finding.*—A special finding, “that the said bank was insolvent, and had done and committed acts of insolvency,” is not bad, as stating a conclusion of law. *Taylor v. Canaday, Rec.*, 671.

USURY—A contract to pay \$10,000 bonus for a loan of \$48,000 is void for usury. See MORTGAGES, 5; *Brown v. Follette*, 316.

VACCINATION—As a condition imposed upon the privilege of children attending school during a period of threatened epidemic of smallpox, see HEALTH 2; *Blue v. Beach*, 121.

VENUE—Where prosecuting attorney files a *quo warranto*, on his own relation, he remains the relator though the venue is changed to another county. See PARTIES 1; *Eel River R. Co. v. State, ex rel.*, 433.

VERDICT—See SPECIAL VERDICT.

A verdict under the indeterminate sentence law, finding defendant guilty of manslaughter is not rendered void because it contains the statement that defendant “is about 55 years old.” See CRIMINAL LAW 19; *Bloom v. State*, 292.

WAIVER—Objection to jurisdiction of court of the person of defendant is waived after full appearance and filing plea in bar. See ABATEMENT; *Eel River R. Co. v. State, ex rel.*, 433.

WARRANTIES—For the sale of machinery, see **SALES** 1, 2, 8; *Marion Mfg. Co. v. Harding* 648; *Reeves & Co. v. Byers*, 535.

WATERS AND WATER COURSES—Measure of damages in action against manufacturing company for the pollution of a stream, see **DAMAGES** 2; *Weston Paper Co. v. Pope*, 394.

1. *Pollution.—Riparian Proprietors.—Damages.*—The fact that a water course is already contaminated from various causes does not entitle others to add thereto, nor preclude persons through whose land the water flows from obtaining relief by injunction against its further pollution. *Ib.*
2. *Pollution.—Drains.—Manufactures.—Damages.*—The rule recognizing the right of a city located on the banks of a stream to discharge its sewage therein, or of a landowner in developing and utilizing the natural resources of his land to discharge water therefrom, which by its natural flowage finds its way to lower lands or into streams, does not apply to a company engaged in the manufacture of articles of commerce for its own profit, which might be operated elsewhere less injuriously to the rights of others, in bringing to its factory material from which, by artificial means, it evolves putrescent, deleterious, and other waste matter which it discharges into a stream. *Ib.*
3. *Pollution.—Riparian Proprietors.—Damages.—Estoppel.*—A riparian owner who donated straw to induce the construction of a strawboard plant and stood by while a large sum of money was expended in its erection, without knowledge or notice that in the operation of the plant the waters of a stream would be unlawfully corrupted and a public nuisance thereby created, is not precluded from asserting a claim for damages for injury to his property and for an injunction. *Ib.*
4. *Pollution.—Manufactures.—Riparian Proprietors.—Damages.*—The fact that a manufacturing company has expended a large sum of money in the construction of its plant, and that it conducts its business in a careful manner and without malice, will not relieve it from liability to a riparian owner for damages for depositing refuse matter into a stream. *Ib.*

WILLS—

1. *Husband and Wife.—Separate Property of Wife.—Election by Wife.*—Where, by the terms of a will, testator gave all of his property to his wife, and provided therein that at the death of the wife "all of the property which she may then own" should be equally divided between his granddaughter and his foster son, such instrument did not present such a case as required the wife, under the equitable doctrine of election, to decide whether she would accept the benefits bestowed upon her therein, and thereby adopt the will as an entirety, and by such acceptance impliedly consent that property, owned and held by her at the time of her death under a deed of conveyance, should be subjected to the provisions of her husband's will, and at her death, as therein provided, should go in equal parts to the granddaughter and foster son.
Cameron v. Parish, 329.
2. *Precatory Clause.—Trusts.*—A testator by the first clause of his will gave to his wife an absolute title to all of his property. By the second and third clauses he expressed the desire that the business should be so conducted that all of their children, or their heirs, should finally share equally in the distribution of the property, and

WILLS—Continued.

advised that his wife should, at some suitable time, call to her counsel two or three good discreet men to assist her in making a proper and equitable division of the real estate and other property among all the children, retaining, however, if she chose to do so, the title and possession of said property to herself until after her death. In the fourth clause it was provided that nothing in the above should be construed to affect a perfect and indefeasible title in the wife "which this will conveys to her." *Held*, that the wife took a fee simple estate in the property devised.

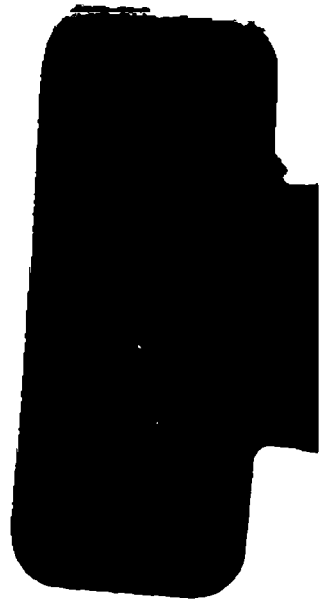
Lumpkin v. Rodgers, 285.

3. *Life Estate.—Power to Sell.—Deeds.*—A testator by the terms of his will gave all of his property to his wife for and during her natural life, with the right to use and expend so much of the property as should be needful for her support, and power to sell the farm, if she desired to do so, with remainder to her niece. *Held*, that a general deed of warranty executed by the wife for a consideration equal to the value of the fee, purporting to convey the fee to such land, constituted a valid conveyance thereof, although the power to convey was not recited in the deed.

Rinkenberger v. Meyer, 152.

4. *Life Estate.—Power to Sell.*—A gift of power to dispose of the whole estate, annexed to an estate for life, with remainder over in fee to a third person, is not void for repugnancy, and confers upon the life tenant plenary power to convey the fee upon the terms of the power granted. *Ib.*

5. *Life Estate.—Power to Sell.*—Where testator gave all of his property to his wife during her life, with remainder over in fee to a third person, and directed that his wife should have the right to use and expend so much of his property as should be needful for her support, with power to sell the farm if she desired to do so, such power to sell did not enlarge the life estate into an estate in fee. *Ib.*



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